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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JA-RU,

Petitioner,

—against—

CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether 15 U.S.C. § 5001, The Federal Imitation Toy Gun Law and the implementing regulations promulgated thereunder by the U.S. Department of Commerce at 15 C.F.R., § 1150 et seq. (collectively, the "Federal Toy Gun Law") preempt the enforcement of New York City Administrative Code Section 10-131(g) ("the Code")?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of *certiorari* to review the judgment entered by the Court of Appeals of New York in this proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals of New York ("Court of Appeals") is reported at 88 N.Y.2d 163, 66 N.E.2d 537 (1996) (affirming the Order of the N.Y. Supreme Court, Appellate Division, First Department ("Appellate Division")) and is reprinted in the Appendix ("APP.") to this petition at 1a-9a. The Order of the Appellate Division granting petitioner's Motion for Leave to Appeal to the Court of Appeals

is reprinted in the Appendix at 10a-11a. The Decision and Order of the Appellate Division entered March 14, 1995, with two Justices dissenting on questions of law in favor of the petitioner is reprinted in the Appendix 12a-19a. The Order and Decision of the Supreme Court, New York County, IAS Part 21 ("N.Y. Supreme Court") (granting preliminary injunction) was issued on April 12, 1994 and entered on/or about April 15, 1994 and is reprinted in the Appendix at 20a-26a. (Collectively referred to as the "N.Y. Courts").

JURISDICTION

The Court of Appeals filed its decision and order on May 7, 1996. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

STATUTES AND REGULATIONS INVOLVED

1. *THE FEDERAL STATUTE*

15 U.S.C. § 5001 entitled "Penalties for Entering Into Commerce of Imitation Firearms enacted in 1988 by Congress" reads in relevant part as follows:

(a) *ACTS PROHIBITED*

It shall be unlawful for any person to manufacture, enter into commerce, ship, transport or receive any toy, look-alike, or imitation firearm unless such firearm contains, or has affixed to it, a marking approved by the Secretary of Commerce, as provided in subsection (b).

(b) *DISTINCTIVE MARKING FOR TOYS, LOOK-ALIKES, AND IMITATION FIREARMS, EXCEPTION, WAIVER, ADJUSTMENTS AND CHANGES*

(1) Except as provided in paragraph (2) or (3), each toy; look-alike, or imitation firearm shall have as an

integral part, permanently affixed, a blaze orange plug asserted in the barrel of such toy, look-alike, or imitation firearm. Such plug shall be recessed no more than 6 millimeters from the muzzle end of the barrel of such firearm.

(2) The Secretary of Commerce may provide for an alternate marking or devise for any toy, look-alike, or imitation firearm not capable of being marked as provided in paragraph (1) and may waive the requirement of any such marking or device for any toy, look-alike or imitation firearm that will only be used in the theatrical, movie or television industry.

(3) The Secretary is authorized to make adjustments and changes in the marking system provided for by this section, after consulting with interested persons.

(c) *LOOK-ALIKE FIREARM DEFINED*

For the purpose of this section, the term "look-alike firearm" means any imitation of any original firearm which was manufactured, designed and produced since 1898, including and limited to toy guns, water guns, replica non-guns, and air-soft guns firing non-metallic projectiles. Such term does not include any look-alike, non-firing, collector replica of an antique firearm developed prior to 1898, or traditional B-B, paint ball or pellet-firing air guns that expel a projectile through the force of air pressure.

(g) *PREEMPTION OF STATE OR LOCAL LAWS OR ORDINANCES, EXCEPTIONS*

The provisions of this section shall supersede any provision of State or local laws or ordinances which provide for marking or identification inconsistent with provisions of this section provided that no state shall

(i) prohibit the sale or manufacture of any look-alike, nonfiring, collector replica of an antique firearm developed prior to 1898, or

(ii) prohibit the sale (other than prohibiting the sale to minors) of traditional B-B paint-ball, or pellet-firing air guns that expel a projectile through the force of air pressure." (See App. 27a-29a).

2. *THE COMMERCE DEPARTMENT REGULATIONS*

Federal regulations under 15 C.F.R. Section 1150.1-1150.5 were then promulgated by the United States Department of Commerce putting into effect the above statute and providing an extensive alternate scheme of color markings for toy guns. (See App. 30a-56a).

3. *THE NEW YORK CITY ADMINISTRATIVE CODE*

New York City Administrative Code Section 10-131(g) (the "Code") enacted into law in 1955 provides:

"It shall be unlawful for any person to sell or offer for sale, possess or use or attempt to use or give away, any toy or imitation pistol or revolver which substantially duplicates an actual pistol or revolver, unless said imitation or toy pistol or revolver shall be colored in colors other than black, blue, silver or aluminum, and further provided that the barrel of said toy or imitation pistol or revolver shall be closed with the same material of which the toy or imitation pistol or revolver is made for a distance of not less than one-half inch from the front end of said barrel. However, the possession or display of such instrument by a manufacturer or dealer, shall not be a violation of this section if sale is accompanied by delivery to a point without the city, and possession for such purpose by a manufacturer or dealer shall not be unlaw-

ful. Every such toy or imitation pistol or revolver hereinafter manufactured, distributed, transported or sold shall have legibly stamped thereon, the name of the manufacturer or some trade name, mark or brand by which the manufacturer can be readily identified." (See App. 56a-57a).

PRELIMINARY STATEMENT

This Federal preemption case merits this Court's review because it provides this Court with the opportunity to consider the preemptive effect of the express preemption clauses in the Federal Toy Gun Law. This is a case of first impression for this Court in that this Federal law, 15 U.S.C. § 5001 and the supplementary regulations thereunder, 15 C.F.R. Section 1150.1-1150.5, have never been reviewed by this Court.

The Court of Appeals' decision is inapposite to the Court's ruling in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608 (1992) and its recent rulings in *Freightliner Corp. v. Myrick*, 115 S.Ct. 1483 (1995) and *Medtronic, Inc. v. Lohr*, 116 S.Ct. 2239 (1996). The Federal Toy Gun Law expressly preempts the Code and the N.Y. Courts have inappropriately relied on cases dealing with implicit not express preemption, (specifically, *Florida Lime and Avocado Growers, Inc. et al. v. Paul*, 374 U.S. 858, 83 S.Ct. 1210 (1963)) or have misconstrued the scope and extent of Federal preemption provided by Congress in the Federal Toy Gun Law.

This case will assist significantly in establishing under what circumstances a Federal statute and its implementing regulations, containing an express preemption provision and comprehensive regulatory scheme, will supersede a state or local law and to what extent preemption should be maintained in furtherance of the Supremacy Clause of the United States Constitution (U.S. Const., Art VI, cl. 2) (*Gibbons v. Ogden*, 22 U.S. 1, 211 (1824)).

More specifically *certiorari* should be granted in order for the express preemptive provision of the Federal Toy Gun Law to be found, as intended, to prohibit state laws or local ordinances which provide for coloration and markings of toy guns which are different or inconsistent from the Federal Toy Gun Law.

In determining whether the Code provisions are "inconsistent" with the Federal Toy Gun Law provisions, the Court of Appeals erroneously interpreted the word "inconsistent" to mean "impossible to comply with both" the Federal Toy Gun Law and the Code. Instead the Court of Appeals should have accorded the term its plain meaning as in "different or incompatible" based on the legislative history, the express preemptive provision contained in 15 U.S.C. § 5001(g), and the extensive regulations promulgated by the United States Secretary of Commerce which sets forth marking and coloration requirements (App. 30a-55a). The Code should also be preempted by the Federal Toy Gun Law since "compliance with both Federal and State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The Court of Appeals ignored the broad implications of such an analysis. This case will also aid significantly in resolving how courts determine whether a Federal statute with an express preemption clause preempts a state or local law and further clarify the effect of such a provision on the doctrine of implied preemption.

STATEMENT OF THE CASE

1. The Toy Gun Is In Full Compliance with the Federal Toy Gun Law

Petitioner, JA-RU, Inc. ("JA-RU") is a national manufacturer and distributor of toy guns. Its products include an item which the City of New York ("the City") alleges violates the

Code in that the item (1) contains the color black which is prohibited by the Code and (2) is not stamped bearing the name of the manufacturer as required by the Code. JA-RU, however, contends that their toy gun fully complies with the Federal Toy Gun Law requirements in that it contains a blaze orange plug recessed no more than 6 millimeters from the muzzle end of the barrel and inappropriately colored. The City does not dispute the fact that JA-RU's products are manufactured in accordance with the requirements of the Federal Toy Gun Law. Indeed, the City was unaware of the Federal regulatory scheme when it commenced the action.

The Federal Toy Gun Law expressly allows that which the City prohibits, namely, the sale of black, blue, silver or aluminum guns, provided that they contain the requisite blaze orange plug or blaze orange band markings prescribed by the regulations. What could be more inconsistent or more in conflict than that which is permitted under the scheme of marking regulation under the Federal Toy Gun Law is prohibited by the Code. Additionally, each of the following methods of marking or coloration permissible under at 15 CFR Part 1150.3 conflict with the requirements of the Code on its face:

1. The Code requires that the barrel of such guns "be closed with the same material of which the gun is made for a distance of *not less than* 1/2" from the front of said barrel." (emphasis supplied) On the other hand, the Federal Toy Gun Law expressly provides for a blaze orange plug, or band marking on the barrel of the toy, recessed no more than 6 millimeters from the muzzle end of such barrel (15 U.S.C. Sect. 5001(b)(2)). What could be more inconsistent than the requirements of the Code when juxtaposed with the requirements of the Federal law!, i.e., if a plastic blaze orange plug is inserted in a metal toy gun, it would be violative of the Code on its face, since it is not made of the

"same material". Also, "the depth of ½"" conflicts with the 6 millimeter requirement of the Federal Toy Gun Law.

2. In addition, the Federal Toy Gun Law allows for a "blaze orange band" around the perimeter of the gun barrel on functional water or light-emitting guns in lieu of plugging the barrel in its entirety, while the City Code requirement requires the barrel to be completely plugged.

3. A black, blue, silver or aluminum toy gun with the federally designated blaze orange plug or marking, permitted under Federal regulations violates the Code.

4. A bright blue toy gun permitted under the Federal regulations violates the code prohibition of use of the color blue.[1]

5. A toy gun whose entire exterior surface is in the following colors, with or without a blaze orange plug or marking:

white	bright red	bright orange
bright yellow	bright green	bright blue
bright pink	bright purple	

either singly or as the predominant color in combination with other colors in any pattern violate the Code, if it contains the colors blue, black, aluminum or silver.

(App. 44a-46a)

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[1] Interestingly, one of the toy guns the City alleges was sold by the other defendants not only contained the required blaze orange plug under 15 U.S.C. § 5001(b)(2), but also was colored bright blue in accordance with the alternate colorations specified in the U.S. Department of Commerce's toy gun regulations. (15 CFR 1150.3(d))

2. The Proceeding in the N.Y. Supreme Court

The original action was commenced on December 16, 1993 by the City seeking an injunction enjoining retailers and manufacturers from selling, distributing or possessing imitation or toy guns in the City of New York in violation of the Code.

JA-RU was served with the Order to Show Cause, Summons and Complaint by fax after the N.Y. Supreme Court - ordered time for service on December 16, 1993 by 5:00 p.m. On less than one hour's notice, counsel for JA-RU appeared on its behalf. Service of the Order to Show Cause was consented to solely for the purpose of contesting the issuance of a preliminary injunction. At such time, the N.Y. Supreme Court denied plaintiff's injunctive relief after counsel for JA-RU raised the previously undisclosed issue of preemption under the Federal Toy Gun Law.

The City requested the N.Y. Supreme Court to reconsider its decision based on the submission of further pleadings. JA-RU opposed any entry of any injunction against it under the Code, since there is no jurisdiction and the City's attempt to enforce the Code is preempted by Federal law.

On or about April 12, 1994, the N.Y. Supreme Court issued a preliminary injunction against JA-RU. The N.Y. Supreme Court held that the Code which, *inter alia*, governs the sale, possession, manufacturing, distributing and transporting of toys or imitation pistols or revolvers, did not conflict with the Federal Toy Gun Law and that Congress, by enacting 15 U.S.C. § 5001 and the regulations promulgated thereunder by the United States Secretary of Commerce, did not intend to preempt the field of marking of toy or imitation firearms. Petitioner, JA-RU, argued that (1) the Federal Toy Gun Law and Code contained explicit inconsistencies, and (2) a plain reading of the exemption provision of 15 U.S.C. § 5001 makes it clear that Congress intended to expressly preempt all state and local laws which require markings on toy guns that are different from those required by the Federal Toy Gun Law.

Conversely, the N.Y. Supreme Court further found that the word "inconsistent" in the preemption clause meant "possessing an inability to simultaneously comply with both regulations" (See App. 25a) as opposed to JA-RU's interpretation that "inconsistent" was intended by Congress to mean "different or incompatible". The N.Y. Supreme Court concluded that compliance with both the Federal Toy Gun Law and Code was not impossible.

JA-RU contended that the N.Y. Supreme Court's decision was erroneous as a matter of law and that the preemption analysis was flawed. Furthermore, JA-RU argued that the N.Y. Supreme Court decision erroneously applied a strained, myopic analysis of the Federal Toy Gun Law in relation to the Code.

By relying so heavily on *Florida Lime and Avocado Growers, Inc., et al., supra*, to support its position, the N.Y. Supreme Court has misconstrued the standard of law applicable to the Federal Toy Gun Law. *Florida Lime and Avocado Growers, Inc. et al., supra* is a case that involved an "implied" preemption claim under marketing orders issued by the Secretary of Agriculture under the Agricultural Adjustment Act ("AAA"). In that case, that Court searched in vain for an unambiguous Congressional mandate evidencing Congressional intent that such marketing orders should displace state regulation. The language of that Act contained only vague reference to a general policy of minimum federal standards and did not evidence an intent to preempt state regulation. *Id.* at 1220-1222. After finding that the AAA did not contain a design to displace state regulation because orders issued by the Secretary under the Act were not "regulations", were meant to be regional and not national in scope and because the legislative history did not require national uniformity, this Court concluded that the statute simply did not create a preemptive national scheme of regulation.

However, the Federal Toy Gun Law bears little resemblance to the AAA. The Federal Toy Gun Law, as noted herein with specificity, contains an express preemption provision and evidences a preemptive design simply not evident in the AAA (compare *Florida Lime and Avocado Growers, supra* with *Campbell v. Hussey*, 368 U.S. 297, 82 S.Ct. 325 (1962), wherein the Federal Tobacco Inspection Act was found to contain a preemptive design).

This Court in *Cipollone v. Liggett Group, Inc., supra* having found an express preemption provision under Section 5(b) of the Public Health Cigarette Smoking Act of 1969, determined that it applied to preempt state common law tort claims based upon a failure to provide consumer warnings beyond that which was required by the Federal law. In reaching its determination, this Court noted:

> "We must give effect to this plain language unless there is a good reason to believe that Congress intended the language to have some more restrictive meaning." (citing *Shaw v. Delta Air Lines, Inc.* 463 U.S. 85, 97, 103 S.Ct. 2890, 2900 (1983)); *Cipollone, supra*, 112 S.Ct. 2608 at 2620.

The New York Courts failed to follow this approach or to adequately consider that the local law would undermine the Federal scheme of regulation.

3. The Decision of the Appellate Division

On March 14, 1995, the Appellate Division affirmed the decision of the N.Y. Supreme Court. However, the decision was not unanimous. Two (2) out the five (5) Justices strenuously dissented. The dissenting Justices of the Appellate Division, recognizing the flawed analysis of the N.Y. Supreme Court, found that:

> "the intent of Congress to supersede local legislation regulating the appearance of toy guns is apparent from

> the face of the statute. In attempt to limit the scope of preemption, Supreme Court relies on cases dealing with implicit, not express, preemption that are inapposite under the circumstances presented by this matter (*see, Cipollone v. Liggett Group*, 505 U.S. 504, 112 S. Ct. 2608; *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 858)." (See App. 16a).

Also, the dissent noted:

> In construing the intent of Congress, Supreme Court misapprehends the language of the preemption provision. By limiting the local ordinances superseded to those that 'provide for markings or identification inconsistent with provisions of this section', the statute does not render preemption of local measures that purport to regulate the *appearance* of a toy gun less than absolute. The limitation merely gives the locality the latitude to regulate *other* aspects of the sale of toy guns, and their sale could presumably be banned altogether. However, the locality is absolutely precluded from enforcing regulations, such as those contained in the Administrative Code provision, that bear on such aspects of the toy's design as its color, its markings or the specifications of the muzzle plug. It was an abuse of discretion to grant plaintiff's motion for a preliminary injunction. (App. 17a)

4. The Opinion of the Court of Appeals

On May 7, 1996, the Court of Appeals, affirming the order of the Appellate Division, answering the certified question "Was the order of Supreme Court, as affirmed by this Court, properly made?", and concluded that Congress has not "expressly or impliedly preempted local regulation of the markings on toy guns and that the conditions set forth in the Administrative Code § 10-131(g) are not incompatible or inconsistent with those provided in the Federal Toy Gun Law in that compliance with both is not impossible". (See App. 2a)

Acknowledging the inherent police power of the states, (App. 4a), the Court of Appeals first reviewed the specific preemption language set forth by Congress in the Federal Toy Gun Law to ascertain whether Congress has preempted all State and local regulation of toy guns pursuant to 15 U.S.C. 5001(g). The Court of Appeals correctly found that the Federal Toy Gun Law's preemption clause expressly preempted state regulation of replicas of antique collector firearms, B-B guns, paint ball guns, or pellet-firing air guns under 15 U.S.C. § 5001(g), which bars any state from prohibiting the sale of such devices, and with respect to antique replicas of pre-1898 firearms, the manufacture of such device (See, 15 U.S.C. § 5001(g)(i) and (ii); *Coalition of New Jersey Sportsmen v. Florio*, 744 F. Supp. 602, 608-609 (D.N.J. 1990)) but erroneously concluded that this was *solely* the extent of preemption intended. The Court of Appeals did not view the sweep of the Federal Toy Gun Law's preemption clause as far-reaching as JA-RU claims (See App. 5a). Congress did not, according to the Court of Appeals' interpretation, "intend to supersede all local regulation of markings on toy guns and dominate the field." (See App. 6a).

The Court of Appeals, supported its finding that the scope of the preemption clause is limited, and not far reaching, by referring to comments by Senator Robert Dole, the legislation's sponsor which in the Court of Appeals' opinion confirmed that Congress did not intend the Federal Toy Gun Law to preempt all state and local measures involving marking of toy guns. However, the Court of Appeals never compared the state statutes referenced to actually determine if their marking requirements were the same as the Federal requirements.

The Court of Appeals, while stating: "inconsistency has been found where local laws prohibit what would have been permissible under state law or impose pre-requisite additional restrictions on rights under state law, so as to inhibit the operation of the states' general laws" (App. 7a), refused to apply

such a standard to review the conflict between the Code and the Federal Toy Gun Law.

The Court of Appeals erroneously determined that Congress did not intend to dominate the field regarding the regulation of *markings* of toy and imitation firearms (App. 8a). The Court of Appeals opined that (1) the Code did not conflict with the conditions enumerated in the Federal Toy Gun Law, (2) it was not impossible to comply with both the Federal and local laws and that (3) co-existence of Federal and local laws regarding the marking of toy and imitation firearms was, in fact, intended by Congress and therefore "did not stand as an obstacle to the accomplishment of the full purposes and objectives of Congress". (App. 8a).

The Court of Appeals rejected the argument of the dissent of the Appellate Division decision that Congress had clearly elected to have a uniform federally dominant scheme of marking for toy guns, which precluded local demarcation requirements which are not compatible with the federal scheme of regulation (App. 17a-18a).

The Court of Appeals also misinterpreted this Court's ruling in *Cipollone v. Liggett Group, Inc.*, *supra* to exclude the possibility of the existence of implied preemption. This interpretation precluded the Court of Appeals from accurately examining Congress' intent. The express provisions of the statute, the regulations promulgated by the United States Department of Commerce, which sets forth a comprehensive scheme of marking and coloration of toy guns, and the Congressional Record pertaining to the adoption of 15 U.S.C. § 5001, clearly establish the existence of a comprehensive Federal scheme of markings for toy guns. Consequently, it is clear that Congress intended to preempt inconsistent local requirements also directed at the markings of such toys.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' decision has completely frustrated and undermined the federal scheme of regulation governing the marking of toy and imitation firearms. Moreover, the ruling opens the door for chaos resulting from conflicting state and local law schemes for marking of toys and imitation firearms. The N.Y. Courts myopically relied on decisions of this Court involving implied preemption (specifically, *Florida Lime and Avocado Growers, Inc., et al., supra*) despite the clear express preemption provision in the Federal law. Furthermore, the N.Y. Courts misapplied the decisions of this Court in *Cipollone v. Liggett Group, Inc., supra* and *Hines v. Davidowitz, supra* as explained in this Court's recent decisions, *Freightliner Corporation v. Myrick, supra* and *Medtronic v. Lohr, supra*).

The Court of Appeals adopted an extraordinarily narrow interpretation of the Federal Toy Gun Law preemption provisions concluding preemption did not exist, finding no actual conflict between the two schemes of regulation (See App. 7a-8a).

The Court of Appeals concluded that the additional conditions imposed by the Code do not conflict with the conditions set forth in the Federal Toy Gun Law and therefore compliance with both is not impossible. If the City Code is held not to be preempted by the Federal Toy Gun Law, it is virtually certain that a uniform scheme of national regulation of markings of toy guns will be supplanted by a multitude of state laws or local ordinances with restrictions of various colors and designs of their choosing. This would result in impeding the manufacturer and sale of toy guns in interstate commerce.

The Court of Appeals has misinterpreted the Court's ruling in *Cipollone v. Liggett Group, Inc., supra* to exclude the possibility of the existence of implied preemption. This

interpretation precluded the Court of Appeals from fully examining Congress' intent which was to establish a comprehensive scheme of marking and coloration of toy guns. The record clearly shows the existence of a comprehensive national scheme of marking requirements. Consequently, the provisions of the Code "stand as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Hines v. Davidowitz, supra.* While the Court of Appeals found that express preemption provisions exist, they limited them to the point where they are undermined. In this case, the Court's care and wisdom is needed to enforce the principle of federal preemption. Only by this means can a uniform scheme of regulation be maintained consistent with the intent of Congress.

I. THE COURT OF APPEALS HAS IGNORED AND MISCONSTRUED THE INTENT OF CONGRESS TO EXPRESSLY PREEMPT STATE AND LOCAL LEGISLATION REGULATING TOY AND IMITATION FIREARMS

A. Preemption Doctrine

The preemption doctrine has been the subject of much recent attention by the Supreme Court. The standard of law has been consistently interpreted. See *Cipollone v. Liggett Group, Inc., supra* at 2617; *Morales v. Trans World Airlines, Inc.*, 504 U.S. ___, 112 S.Ct. 2031, 2036-2037 (1992); *American Airlines, Inc. v. Wolens*, 115 S.Ct. 817 (1995) (invoking express preemption); *Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 112 S.Ct. 2374, 2383 (1992) (invoking implied preemption); *Medtronic, Inc. v. Lohr, supra*; *Freightliner Corp. v. Myrick, supra.*

The Supremacy Clause of the Constitution clearly provides that the laws of the United States "shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution of laws of any state to the contrary notwithstanding" U.S. Constitution, Art. VI, cl. 2. It is

well settled that state law that conflicts with federal law is "without effect". *Cipollone v. Liggett Group, Inc., supra*, citing *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 2128 (1981). Since *McCulloch v. Maryland*, 17 U.S. 316, 427, 4 L.Ed. 579 (1819), the Supreme Court has held that state law which conflicts with federal law is preempted. Traditionally, a three-prong judicial inquiry is involved: first, a court must assess the comprehensive nature of the federal regulatory scheme; second, a court must determine whether there is a dominant federal interest involved in the regulations; and, third, a court must analyze the threat of conflict between state and local laws and the effective administration of the federal program. *Pennsylvania v. Nelson*, 350 U.S. 497 at 502-6, 76 S.Ct. 477 at 48-82, 100 L.Ed. 640 (1956).

In performing the preemption analysis the Court starts with the assumption that the historic police powers of states are not to be superseded by federal acts unless that is the clear and manifest purpose of Congress. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152 (1947). Furthermore, in order for preemption to apply in the area of a state's police powers, Congress, or the agency charged with administering a statute, must make its intent to preempt "clear and manifest" *Hillsborough County v. Automated Medical Labs, Inc.*, 471 U.S. 707, 718, 105 S.Ct. 2371, 85 L.Ed. 714 (1985); *Toy Manufacturers of America, Inc. v. Blumenthal*, 986 F.2d 615, 622 (2d Cir. 1992). However, Congress under the Commerce Clause may displace state power (*Rice v. Santa Fe Elevator Corp., supra*, 331 U.S. at 234-36, 675 (S.Ct. at 1154-55), or Congress, by its silence, may indicate a purpose to let state regulation be imposed on the federal regime. *Florida Avocado Growers, Inc., et al. v. Paul, supra* at 141-143; *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96, 103-04, 84 S.Ct. 219, 222 (1963); *Pennsylvania v. Nelson, supra*. The question of whether the Code is preempted by the Federal Toy Gun Law is one of Congressional intent. "The purpose of Congress is the ultimate touchstone." *Allis-*

Chalmers Corp. v. Lueck, 471 U.S. 202, 208, 105 S.Ct. 1904 (1985) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504, 98 S.Ct. 1185, 1189 (1978)); *Retail Clerks Int'l Ass'n v. Schermerhorn*, *supra*; see also *FMC Corp. v. Holliday*, 498 U.S. 403, 111 S.Ct. 403, 407 (1990).

Preemption may be either express in the statute or implied by its structure and purpose. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 98 S.Ct. 1305, 1309 (1977); *Shaw v. Delta Airlines, Inc.*, *supra* at 95, 103; *Fidelity Federal Savings & Loan Assn v. De la Questa*, 458 U.S. 141, 152-153, 102 S.Ct. 3014, 3020 (1982). Furthermore, an express preemption provision does not preclude the possibility of implied preemption. *Freightliner Corp. v. Myrick*, *supra*. Two types of implied preemption are recognized: field preemption, where the scheme of federal regulation is "so prevasive as to make reasonable the inference that Congress left no room for the states to supplement it." *Fidelity Federal Savings & Loan Assn v. De La Questa*, *supra* at 153 quoting *Rice v. Santa Fe Elevator Corp.*, *supra* at 230, and conflict preemption, where the state law is preempted if that law actually conflicts with federal law (see *Pacific Gas & Electric Co. v. Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 203, 103 S.Ct. 1713, 1722 (1983)) or where compliance with both federal and state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, *supra*; *Felder v. Casey*, 487 U.S. 131, 138, 108 S.Ct. 2302 (1988); *Perez v. Campbell*, 402 U.S. 637, 649, 91 S.Ct. 1704 (1971).

B. Application of Express Preemption Doctrine

The analysis utilized by the Court of Appeals in reviewing the express preemption provision in the Federal Toy Gun Law and determining congressional intent is faulty and departs dramatically from the Court's guidance in this area. In the Court's recent decision, *Medtronic, Inc.v. Lohr*, *supra* the Court, as in *Cipollone v. Liggett Group, Inc.*, *supra* was

required to interpret a statutory provision that expressly pre-empts state law. The Court noted that:

> "although our analysis of the scope of the pre-emption statute must begin with its text (see *Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 111, 112 S.Ct. 2374 (1992)) our interpretation of that language does not occur in a contextual vacuum. Rather the interpretation is informed by two presumptions about the nature of pre-emption. First, . . . we start with the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress, Id. at 230, 67 S.Ct. at 1152; *Hillsborough Cty*, 471 U.S. at 715-76, 105 S.Ct., at 2376; cf. *Fort Halifax Packing Co.v. Coyne*, 482 U.S. 1, 22, 107 S.Ct. 2211, 2223, 96 L.Ed. 2d 1 (1987). . . Second, our analysis of the scope of the statute's pre-emption is guided by our oft-repeated comment, initially made in *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103, 84 S.Ct. 219, 222, 11 L.Ed.2d 179 (1963), that the purpose of Congress is the ultimate touchstone in every pre-emption case. See e.g. *Cipollone*, 505 U.S. at 516, 112 S.Ct. at 2617; *Gade*, 505 U.S. at 96, 112 S.Ct., at 2381, 2382; *Malone v. White Mater Corp.*, 435 U.S. 497, 504, 98 S.Ct. 1185, 1190, 55 L.Ed.2d 443 (1978). As a result, any understanding of the scope of a pre-emption statute must rest primarily on "a fair understanding of congressional purpose *Cipollone*, 505 U.S. at 530, n. 27, 112 S.Ct., at 2624, n.27. Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the statutory framework surrounding it. *Gade*, 505 U.S., at 111, 112 S.Ct. at 2390. . . Also relevant, however, is the structure and purpose of the statute as a whole, *id.* at 98, 112 S.Ct., at 2383. . . , as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its

surrounding regulatory scheme to affect business, consumers and the law" *Medtronic, Inc. v. Lohr*, 116 S.Ct. 2239 (1996).

In the Court of Appeals' view, the Code is not preempted because it is restrictive but not prescriptive. This is to say they find a distinction between restricted use of color as opposed to the prescriptive use of color to mark toy guns. However, this analysis is too myopic. First, a restriction could have as much a substantive impact as a prescription. Both can result in inconsistent standards of coloration for toy guns. Second, such reasoning ignores the specific instances of incompatibility between the Code and the Federal Toy Gun Law which we have previously enumerated. While we agree the Federal Toy Gun Law does not act as an absolute bar to state and local regulation via supplementary enforcement, it does supersede state and local schemes of regulation which have incompatible schemes of coloration or demarcation of toy guns.

A plain reading of 15 U.S.C. § 5001 makes it clear that Congress meant to expressly preempt all state and local laws inconsistent with the Federal Law. Under the facts of the instant case, application of the Code is inconsistent with the Federal Law.

As we have noted, the appropriate analysis of preemption thus requires the Court to ascertain Congress' intent in enacting the federal statue at issue. "The purpose of Congress is the ultimate touchstone." *Allis-Chalmers Corp. v. Lueck*, *supra* at 208. The Court must "consider the plain language of an express preemption provision as the most salient factor." (*Shaw v. Delta Air Lines, Inc.*, *supra* at 2900; *Morales v. Trans World Airlines, Inc.*, *supra* at 2036).

In the instant case, 15 U.S.C. § 5001 preempts the Code since the Code requires markings on toy guns that are "inconsistent" with those required by the Federal law. The heading

of 15 U.S.C. § 5001(g) is clear and specific. It provides as follows: "(g) *PREEMPTION OF STATE OR LOCAL ORDINANCES; EXCEPTIONS*". While many statutes do not have specifically titled preemption provisions or even use the word "preemption", this particular statute is quite express. The Section title alone makes it clear that Congress intended to supersede state or local laws or ordinances. This is further evidenced by the wording of the preemption provision, which states: "The provisions of this section shall supersede any provisions of State or local laws or ordinances which provide for markings or identification inconsistent with provisions of this section. . .". Congress was clear that they intended the markings and scheme of identification provided for in the statute (15 U.S.C. § 5001) and in the supplementary regulations issued by the Secretary of Commerce to be paramount and that no state or local authority should be able to provide for a different scheme of markings (whether by restrictive or prescriptive color, symbol, design or otherwise).

The plain reading of the statute's wording contradicts the N.Y. Court's strained interpretation of the word "inconsistent" as it is used in the Federal statute. Webster's Universal Unabridged Dictionary defines "inconsistent" as follows: ". . . lacking agreement in kind, nature, form, etc.; not in harmony or accord; incompatible; not uniform; not holding together; self-contradictory; not holding to the same principles or practice". Therefore, a plain reading of the language of preemption does not support the N.Y. Court's myopic view. It is irrelevant that it might be possible to comply with both standards, if the standards are inconsistent as defined above.

This is also very clear from the Congressional Record evidencing the adoption of the Federal statute. For example, both Representative Moorehead and Senator Robert Dole, in recognizing the need for a comprehensive scheme of federal regulation of markings on toys guns, stated:

> "Unfortunately, as I have previously noted, recently a few states and local jurisdictions have enacted laws or ordinances with inconsistent or conflicting provisions. Some have banned the sale of a few items altogether, while others have required different methods of marking."

They further clarified the need for strong preemption by stating:

> "Any State or local laws or ordinances which provide for inconsistent or conflicting marking or identification shall be preempted and superseded. For example, a local ordinance banning sale of traditional B-B, paint ball or pellet-firing air guns would be of no force and effect. *Also, if there were a State law that required a green colored plug or a red stripe on the side. It too would be nullified.* (emphasis supplied)

Congressional Record-Senate, S15534-15535 and *Congressional Record-House*, H10073.

Additionally, the enabling regulations established by the Department of Commerce at 15 C.F.R. § 1150 et seq. provide a strong indicia of Congressional intent to occupy the field of regulation of the markings of toy and imitation firearms. As we have noted, 15 C.F.R. § 1150.3 provides an expansive scheme of marking these products. These markings include a blaze orange solid plug permanently affixed to the muzzle of the barrel and recessed no more than 6 millimeters from the muzzle end of the barrel, a blaze orange coloration of the exterior surface of the barrel to the depth of 6 millimeters, the use of transparent or translucent materials for the construction of the gun, or the coloration of the entire exterior surface of the gun in white, bright red, bright orange, bright yellow, bright blue, bright green, bright pink or bright purple, either singly or as the predominant color in combination with other colors in any pattern. These regulations were carefully con-

sidered before adoption by the Department of Commerce (See App. 34a-56a). Additionally, 15 C.F.R. § 1150.1 makes it clear that the regulations are intended to apply "to toy, look-alike and imitation firearms having the appearance, shape and/or configuration of a firearm and produced or manufactured or entered in commerce on or after May 5, 1989. . .". 15 C.F.R. § 1150.5 (entitled "Preemption") carries through the Congressional intent expressly evidenced by the statute's language to supersede any provision of State or local law or ordinance which provides for markings or identification which differ from the federal statute or these regulations.

The Court is clear that the Department of Commerce regulations are afforded great deference in statutory interpretation *Cf. Helvering v. Winmill*, 305 U.S. 79, 59 S.Ct. 45, 83 L.Ed. 52 (1938); *Coalition of New Jersey Sportsmen v. Florio*, *supra* at 607. However, the Court of Appeals ignores the comprehensive coloration requirements administered by the Department of Commerce.

While we believe the Federal Toy Gun Law does not prevent state and local regulations which regulate other aspects of toy guns not covered by the Federal Toy Gun Law, such as sale, packaging or display, the law does supersede state and local schemes of regulation which have different directives regarding the appearance of toy guns.

When taken as whole, the clear and manifest intent of Congress as demonstrated by the construction of the State itself and the implementing regulations dictates that the Code provisions are incompatible with the requirements under the Federal Law and are superseded thereby. It is difficult to imagine a more specific expression of Congressional intent to supersede local regulation of coloration of toy guns than is evident here.

II. ASSUMING ARGUENDO THAT THE EXPRESS PREEMPTION PROVISION IS LIMITED, THE FEDERAL TOY GUN LAW IMPLIEDLY PREEMPTS THE CODE

Even assuming arguendo that the Court of Appeals was correct in finding that Congress has not expressed an intent to supersede all state or local regulation in the field of marking of toy or imitation firearms, the Court of Appeals still erred in finding that the Federal law did not preempt the Code.

The Court of Appeals' decision ignored this Court's analysis in *Freightliner Corp. v. Myrick, supra*. The Court in *Myrick* further explained its holding in *Cipollone v. Liggett Group, Inc., supra* specifically with regard to how a Court is to review an express preemption provision. The Court stated "the fact that an express definition of the preemptive reach of a statute 'implies'—i.e. supports a reasonable inference that Congress did not intend to pre-empt other matters does not mean that the express clause entirely forecloses any possibly of implied pre-emption" *Freightliner Corp. v. Myrick, supra.*

The Court of Appeals, upon determining the limited application of the preemption provision, ceased its analysis in contradiction to this Court's holding in *Cipollone* further clarified in *Freightliner v. Myrick Corp.* which required the Court of Appeals to evaluate the Federal Toy Gun Law for the presence of implied preemption. The Court of Appeals did not consider whether there existed implied conflict pre-emption where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz, supra.*

Clearly, the Federal law and enabling regulations were intended by Congress to offer a uniform marking system for toy guns nationwide to safeguard the public and provide means for distinguishing toy or imitation firearms from real firearms and to prevent individual states from enacting different marking requirements which would ultimately hinder

the manufacture and sale of toy guns in interstate commerce. In *Myrick* the Court found no preemption of state common law design defect claims since there was no Federal standard to comply with. Conversely, in this case, there exists a comprehensive scheme of marking requirements which, through the express preemptive language, the enabling regulations and legislative history was intended to preclude state laws or local ordinances which impose marking requirements for toy guns.

Furthermore, the Court of Appeals ignores its own analysis of "preemptive intent"as set forth in *Vatore v. Commn. of Consumer Affairs of the City of New York, et al.*, 83 N.Y.2d 645, 612 N.Y.S.2d at 357 (1994) and *New York State Club Assn., Inc.v. City of New York*, 69 N.Y.2d 211, 513 N.Y.S.2d 349 (1987). According to the Court of Appeals in *Vatore v. Commn. of Consumer Affairs*, in the absence on any general preemptive intent, "preemptive intent may be inferred from the nature of the subject matter being regulated and the purpose and scope of the state legislative scheme", *Vatore v. Commn. of Consumer Affairs, supra*. Clearly, preemptive intent is apparent from the comprehensive scheme of marking of toy and imitation firearms set forth in the Federal Toy Gun Law. Consequently, the Federal Toy Gun Law is "the supreme law of the land" (U.S. Const., Art V1, c1 2) and the conflicting Code is therefore "without effect", *Cipollone v. Liggett Group, supra* at 2617.

CONCLUSION

For the foregoing reasons, the Petition for a Writ *certiorari* should be granted here.

Respectfully submitted,

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COURT OF APPEALS
STATE OF NEW YORK

1 No. 96 .

CITY OF NEW YORK,

Respondent,

—v.—

JOB-LOT PUSHCART, *et al.*,

Defendants,

JA-RU,

Appellant.

FREDERICK B. LOCKER, *for appellant.*
GEORGE GUTWIRTH, *for respondent.*

OPINION

CIPARICK, J.:

Since 1955, New York City has outlawed the sale, possession or use of any toy or imitation gun which substantially resembles an actual firearm because of the toy's potential for nefarious exploitation (*see*, Administrative Code of City of NY § 10-131[g]; Proc of NYC Council, at 24 [Jan 18, 1955]). Only toy guns that are not blue, black, silver or aluminum in color, bear an identifiable trade name or mark, and contain a solid plug in the barrel can be sold, possessed or used in New

York City (*see*, Administrative Code § 10-131[g]). At issue is whether these conditions are preempted by the 1988 Federal Toy Gun Law. We conclude that Congress has not expressly or impliedly preempted local regulation of the markings on toy guns and that the conditions set forth in Administrative Code § 10-131(g) are not incompatible or inconsistent with those provided in the Federal Toy Gun Law in that compliance with both is not impossible. Indeed, compliance with the Administrative Code conditions furthers the public safety aim of the federal statute. Therefore, we affirm the order of the Appellate Division and answer the certified question in the affirmative.

I.

The City instituted this action against defendants, entities that place toy guns into the New York City stream of commerce, to permanently enjoin the manufacture, distribution, transportation, sale and possession of toy weapons in violation of Administrative Code § 10-131(g). Evidently, the toy guns confiscated from defendants duplicate the semi-automatic assault pistols frequently used in the commission of crimes, are black in color, and do not bear any mark identifying the manufacturer. In opposition to plaintiff's order to show cause seeking a preliminary injunction, defendant-appellant JA-RU, Inc., a national distributor and marketer of toy guns, moved for a declaration that Administrative Code § 10-131(g) was preempted by the Federal Toy Gun Law (15 USC § 5001) and its implementing regulations (15 CFR § 1150, et seq) (collectively, the Federal Toy Gun Law), arguing that the City's action contravened the federal statute regulating toy weapons. Ja-Ru represented that it distributes toy guns that comply with the markings approved by the Secretary of Commerce, which require that the toy contain a "permanently affixed blaze orange plug inserted in the barrel recessed no more than 6 millimeters from the muzzle end" (15 CFR § 1150.3[a]).

Supreme Court preliminarily enjoined defendants from selling and distributing toy guns in violation of Administrative Code § 10-131(g), and denied Ja-Ru's motion by declaring that Administrative Code § 10-131(g) is not preempted by 15 USC 5001. The Appellate Division affirmed, with two Justices dissenting (*see, City of New York v Job-Lot Pushcart et al*, 213 AD2d 210), and certified to us the question, "Was the order of Supreme Court, as affirmed by this Court, properly made?"

On this appeal, Ja-Ru strenuously argues that Congress's intent to preempt all state and local laws relating to toy guns is plain on the face of 15 USC § 5001(g). According to Ja-Ru, Congress delineated a comprehensive scheme of identification and markings that cannot be superseded by a different state or local scheme. Because Administrative Code § 10-131(g) prohibits what is permitted under the Federal Toy Gun Law, Ja-Ru asserts, the Administrative Code provision is inconsistent with the Federal Toy Gun Law. Ja-Ru posits that preemption of the incompatible City law comports with "one of the [federal statute's] essential purposes . . . a uniform scheme of national regulation." We disagree.

II.

The premise of Ja-Ru's argument is the well-settled rule that the Supremacy Clause of the United States Constitution (US Const, art VI, cl 2) invalidates State or local laws that "interfere with or are contrary to" Federal law (*Gibbons v Ogden*, 22 US 1, 211). However, the conclusion urged by Ja-Ru—that the Federal Toy Gun Law preempts Administrative Code § 10-131(g)—does not result from an application of traditional preemption principles but from the economic impact on Ja-Ru as a result of the ban on the distribution of its toy guns in New York City.

The threshold issue in the preemption analysis is whether the subject Federal legislation intrudes on traditional police powers reserved to the States (*see, Cipollone v Liggett Group Inc.*, 505 US 504, 516). Historically, the regulation of health,

safety and welfare has been the province of the States (*see, Toy Mfrs of America, Inc. v Blumenthal*, 986 F2d 615, 617). The United States Supreme Court has decreed that unless Congress manifestly and clearly intends to preempt the States' exercise of jurisdiction over matters relating to the welfare of their citizens, the States' police powers are not to be superseded by a Federal Act (*see, Rice v Santa Fe Elevator Corp*, 331 US 218, 230; *see also, Fidelity Fed Sav & Loan Assn v De la Cuesta*, 458 US 141, 152-153; *United Auto, Aircraft and Agr Implement Workers of America v Wisconsin Empl Rel Bd*, 351 US 266, 274-275 ["States are the natural guardians of the public against violence . . . We would not interpret an act of Congress to leave them powerless to avert . . . emergencies without compelling directions to that effect"]; *Florida Lime and Avocado Growers, Inc. v Paul*, 373 US 132, 146-147; NY Const, art IX, § 2[c][ii]). Therefore, the "purpose of Congress is the ultimate touchstone of preemption analysis" (*Retail Clerks Int'l Assn, Local 1625 v Schermerhorn*, 375 US 96, 103).

Because it is uncontroverted that Administrative Code § 10-131(g) represents a valid exercise of the police powers delegated to the City by the State Constitution and the Municipal Home Rule provisions (*see, People v Judiz*, 38 NY2d 529, 531), the efficacy of the City ordinance turns on whether Congress has preempted all State and local regulation of toy guns pursuant to 15 USC § 5001(g) (*see, Florida Lime and Avocado Growers, Inc v Paul*, 373 US, at 42, *supra*; *see also, Consolidated Edison Co of NY, Inc v Town of Red Hook*, 60 NY2d 99, 107; *People v DeJesus*, 54 NY2d 465, 468; *People v Lewis*, 295 NY 42, 49-50).

As we summarized in *People v Pymm*, 76 NY2d 511, 519, *cert denied sub nom, Pymm v NY*, 498 US 1085, there are three ways in which a Federal law can preempt a State or local law: one, by express provision in the Federal statute; two, by inference, where the Federal legislative scheme is so pervasive and the character of the obligations imposed leaves no room for the State or local government to legislate; and three, to the extent that the State or local law actually conflicts with the Federal law, for example where compliance

with both is impossible or adherence to the State or local law would thwart the objectives of its Federal counterpart ([internal citations omitted]; *see also, Barnett Bank of Marion Co, N.A. v Nelson*, __ US __, 64 USLW 4161, 4162-4163).

We turn first to a consideration of the specific language of preemption employed by Congress in the Federal Toy Gun Law.

A.

The preemption provision in the Federal Toy Gun Law provides that

> The provisions of this section shall supersede any provision of State or local laws or ordinances which provide for markings or identification inconsistent with provisions of this section provided that no State shall
>
> (i) prohibit the sale or manufacture of any look-alike, nonfiring, collector replica of an antique firearm developed prior to 1898, or
>
> (ii) prohibit the sale (other than prohibiting the sale to minors) of traditional B-B, paint ball, or pellet-firing air guns that expel a projectile through the force of air pressure.

(15 USC § 5001[g]).

The sweep of the Federal Toy Gun Law's preemption clause is not as far-reaching as Ja-Ru and the dissenters below contend by urging that the statutory language explicitly preempts the field and ends the inquiry (*see, City of New York v Job-Lot Pushcart Inc*, 213 AD2d, at 213, *supra*). Rather, the plain language employed by Congress demonstrates that only State regulation of replicas of antique collector firearms, B-B guns, paint ball guns, or pellet-firing air guns is expressly preempted under 15 USC § 5001(g), which bars any State from prohibiting the sale of such devices, and with respect to antique replicas of pre-1898 firearms, the manufacture of such devices (*see*, 15 USC § 5001[g][i] and [ii];

Coalition of New Jersey Sportsmen v Florio, 744 F Supp 602, 608-609).

The clearly defined reach of this provision compels the conclusion that Congress did not intend to supersede all local regulation of markings on toy guns. Where "Congress has considered the issue of preemption and has included . . . a provision explicitly addressing that issue . . 'there is no need to infer congressional intent to preempt [other] state laws from the substantive provisions of the legislation.' . . . Congress' enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not preempted" (*Cipollone v Liggett Group, Inc.*, 505 US, at 517, *supra* [internal citation omitted]; *see also*, *Vatore v Commn of Consumer Affairs of the City of NY*, 83 NY2d 645, 650). Similarly, when we considered whether a State environmental statute superseded a town ordinance on the same subject, we rejected the proposition that the "mere fact that the State deals with a subject [means] it automatically preempts it" (*Monroe-Livingston Sanitary Landfill Inc. v Town of Caledonia*, 51 NY2d 679, 683; *see also*, *People v Lewis*, 295 NY, at 50, *supra*).

The limited scope of the preemption clause is confirmed by the comments of the legislation's sponsor, Senator Robert Dole, made during the Senate debate that "[a]t the suggestion of the California Senators, the preemption section has been modified to accommodate the new California law" (134 Cong Rec S15531, 15534 [daily ed. Oct 6, 1988]). The very fact that the preemption clause in the federal statute was modified before adoption, to permit a recently enacted California statute to stand, constitutes an explicit acknowledgment of the validity of State regulatory measures and provides compelling evidence that Congress was not impliedly imposing a pervasive, preemptive regulatory scheme. Ja-Ru's assertion, then, that the essential purpose of the Federal Toy Gun Law is to promote a "uniform system of national regulation" rings hollow. This contention is further undermined when Ja-Ru's true intention—the unimpeded flow of toy guns through interstate markets—is juxtaposed against the actual goal of the Federal Toy Gun Law—guarding the public safety, which was

also the motivating objective for the City Council's adoption of Administrative Code § 10-131(g) in 1955 (*see*, 134 Cong Rec, at S15534, *supra*, [statement of Sen Dole that the purpose of his amendment was to "allow continued production, sale and distribution of toy guns, while at the same time reducing the potential for misuse as much as possible . . . [as] a few incidents have actually occurred to date involving the criminal misuse of toy or imitation guns . . ."]; 134 Cong Rec H10071 [daily ed. Oct 12, 1988] [statement of Rep Moorhead, same as above]; Proc of Council of NYC, at 24, *supra*). However laudable a national public safety campaign regulating the sale and use of realistic toy guns may be, it remains that Congress did not enact the Federal Toy Gun Law to supplant all State and local measures. The issue then narrows to whether the conditions set forth in Administrative Code § 10-131(g) "provide for markings or identification inconsistent with the provisions" of the Federal Toy Gun Law to the extent that there is "such actual conflict between the two schemes of regulation that both cannot stand in the same area" (*Florida Lime and Avocado Growers, Inc. v Paul*, 373 US at, 142-143, *supra*).

B.

On the State level, "inconsistency 'has been found where local laws prohibit what would have been permissible under State law or impose prerequisite additional restrictions' on rights under State law, so as to inhibit the operation of the State's general laws" (*New York State Club Assn, Inc. v City of New York*, 69 NY2d 211, 217 *affd* 487 US 1, *quoting. FTB Realty Corp. v Goodman*, 300 NY 140, 147-148 [internal citations omitted]; *see also, Florida Lime and Avocado Growers Inc. v Paul*, 373 US, at 143, *supra*; *Vatore v Commn of Consumer Affairs of the City of NY*, 83 NY2d, at 649, *supra; Monroe-Livingston Sanitary Landfill, Inc. v Town of Caledonia*, 51 NY2d, at 682, *supra*). Likewise, where Congress has not expressed an intent to supersede all State or local regulation in a field, a State or local law will be preempted if it

is impossible to comply with both the local and Federal law (*see, Florida Lime Avocado Growers, Inc. v Paul, supra*, 373 US, at 142-143), or the State or local law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress (*see, Hines v Davidowitz*, 312 US 52, 67; *Barnett Bank of Marion Co, N.A. v Nelson*, 64 USLW, at 4163, *supra*).

The Federal Toy Gun Law only supersedes State or local laws that "provide for markings or identification inconsistent with" its terms. The additional conditions imposed by Administrative Code § 10-131(g) do not conflict with the conditions enumerated in the Federal Toy Gun Law. As the Appellate Division noted "it is feasible to make a red or purple toy gun [which bears the manufacturer's trade name and contains] an orange [plug], satisfying both laws" (*City of New York v Job-Lot Pushcart*, 213 AD2d, at 210, *supra*). Therefore, it is not impossible to comply with both the Federal Toy Gun Law and Administrative Code § 10-131(g). That the sale of Ja-Ru's toy guns is only illegal under the terms of the local provision is not a basis for preemption of the City law, as the dissenters below opine, because "this general principle applies only where the Legislature has shown its intent to preempt the field" (*Vatore v Commn of Consumer Affairs of NYC*, 83 NY2d, at 651, *supra*). Indeed, compliance with both the Federal and local laws at once furthers the intent of Congress and achieves the public safety objective underlying each measure. The Federal Toy Gun Law seeks to impose some regulatory guidelines, in part, to override local laws that completely banned toy guns from certain jurisdictions (*see*, 57 Fed Reg 48,451 [1992] [codified at 15 CFR § 1150 et seq]; 134 Cong Rec, at S15534, *supra*). In response to these local bans, the Hobby and Toy Industry of America and the Toy Manufacturers of America pressed Congressional members for passage of the Federal Toy Gun Law, which incorporates markings voluntarily adopted by the industry (*see*, 134 Cong Rec, at S15534, *supra*). Against this backdrop, the Federal Toy Gun Law is not an attempt to dominate the field. States and localities can erect a regulatory framework that expands upon the Federal foundation, and to the extent that Administrative Code § 10-131(g) complements the Federal Toy Gun

Law, the City's regulatory conditions can co-exist with the federal statute.

Accordingly, the order of the Appellate Division should be affirmed, with costs, and the certified question answered in the affirmative.

* * *

Order affirmed, with costs, and certified question answered in the affirmative. Opinion by Judge Ciparick. Chief Judge Kaye and Judges Simons, Titone, Bellacosa, Smith and Levine concur.

Decided May 7, 1996

ORDER GRANTING LEAVE TO APPEAL

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on September 26, 1995

Present—Hon. Francis T. Murphy, Presiding Justice
Betty Weinberg Ellerin
Israel Rubin
Milton L. Williams, Justices

M-3288
Index No. 407282/93

CITY OF NEW YORK,

Plaintiff-Respondent,

—against—

JOB-LOT PUSHCART, *et al.*,

Defendants,

JA-RU,

Defendant-Appellant.

The above-named defendant-appellant, having moved for leave to appeal to the Court of Appeals from the decision and order of this Court entered on March 14, 1995 (Appeal No. 53255),

Now, upon reading and filing the papers with respect to the motions, and due deliberation having been had thereon,

It is ordered that the motion be and the same hereby is granted insofar as to grant leave to appeal to the Court of Appeals, and this Court, pursuant to CPLR 5713, certifies that the following question of law, decisive of the correctness of its determination, has arisen, which in its opinion ought to be reviewed by the Court of Appeals:

> "Was the order of the Supreme Court, as affirmed by this Court, properly made?"

This Court further certifies that its determination was made as a matter of law and not in the exercise of discretion.

ENTER:

/s/ CATHERINE O'HAGAN WOLFE
Catherine O'Hagan Wolfe
Clerk

APPELLATE DIVISION, SUPREME COURT
FIRST DEPARTMENT

March 14, 1995

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Murphy, P.J., Rosenberger, Ellerin, Rubin, Williams, JJ.

53255

CITY OF NEW YORK,

Plaintiff-Respondent, G. Gutwirth

—against—

JOB-LOT PUSHCART, *et al.*,

Defendants,

JA-RU,

Defendant-Appellant, F.B. Locker

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered on or about April 12, 1994, which, *inter alia*, granted plaintiff's motion for a preliminary injunction against defendant JA-RU, enjoining it from violating New York City Administrative Code § 10-131 (g), affirmed, without costs.

The IAS court properly found that Administrative § 10-131(g), which, *inter alia*, governs the sale, possession, manufacturing, distributing and transporting of toys or imitation

pistols or revolvers, was not preempted by 15 USC § 5001, and Federal regulations 15 CFR part 1150, which also governs, *inter alia*, the manufacture, shipping, and transport of any toy, look-alike and imitation firearms.

Consideration of issues arising under the Supremacy Clause of the US Constitution (Art. VI) "start[s] with the assumption that the historic police powers of the States were not to be superseded by Federal Act unless that was the clear and manifest purpose of Congress" (*Rice v Santa Fe Elev. Corp.*, 331 US 218, 230). "In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law . . . ". (*Cipollone v Liggett Group*, 112 S Ct 2608, 2617). A conflict occurs either because "compliance with both federal and state regulations is a physical impossibility" (*Florida Lime & Avocado Growers, Inc. v. Paul*, 373 US 132 142-143), or because the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" *Hines v Davidowitz*, 312 US 52, 67). Here, rather than being inconsistent, the code complements the Federal statute inasmuch as both statutes may be satisfied simultaneously. In this regard, defendant argues that the Federal statute allows what the Administrative Code prohibits, namely, the sale of black, blue, silver or aluminum guns, provided they contain the required blaze orange plug or blaze orange band markings prescribed by the federal regulations. However, it is feasible to make a red or purple toy gun with an orange band, thus satisfying both laws. Defendant also claims that the Federal statute expressly provides for a blaze orange plug or a band marking on the barrel of the toy, recessed no more than 6 millimeters from the muzzle end of such barrel (15 USC 5001[b][1]), while the Administrative Code requires that the barrel of such guns "be closed with the same material of which the gun is made for a distance of not less than $^1/_2$" from the front of said barrel. It gives an example that "if a plastic blaze orange plug is inserted in a metal toy gun, it would be violative of the Code on its face." However, a toy gun with a closed barrel and an orange blaze band, made in a color other than those prohibited by the Administrative Code, would also satisfy both laws.

As defendant concedes, the Federal statute allows for a "blaze orange band" around the perimeter of the gun barrel on function water or light-emitting guns in lieu of plugging in the barrel in its entirety. Moreover, as the I.A.S. court properly found, the purpose of the Federal statute and Administrative Code are the same: to prevent the sale of toy guns so closely copied from actual weapons as not to be readily discernible as toys, which plaintiff has shown have been utilized in the commission of violent crimes.

Accordingly, the court properly found that plaintiff was likely to prevail in its effort to enforce the Administrative Code against defendant. In addition, its conclusion that irreparable harm would occur without the injunction, based on the role toys guns play in the commission of crimes, and its determination that the equities balance in plaintiff's favor, on the grounds that the City has a right to protect its citizenry, was well founded.

We have reviewed defendant's other claims and find them to be without merit.

All concur except Rosenberger, J. and Rubin, J. who dissent in a memorandum by Rubin, J., as follows:

RUBIN, J., dissenting.

At issue on this appeal is whether a section of the New York City Administrative Code that regulates the sale, possession and use of toy guns (§ 10-131[g]) is preempted by federal legislation entitled "Penalties for Entering Into Commerce of Imitation Firearms" (enacting 15 USC § 5001; *Coalition of New Jersey Sportsmen v Florio*, 744 F Supp 602, 607). The Administrative Code provision, enacted into law in 1955, makes it unlawful "to sell or offer for sale, possess or use or attempt to use or give away, any toy or imitation pistol or revolver which substantially duplicates an actual pistol or revolver, unless said imitation or toy pistol or revolver shall be colored in colors other than black, blue, silver or

aluminum, and further provided that the barrel of said toy or imitation pistol or revolver shall be closed with the same material of which the toy or imitation pistol or revolver is made for a distance of not less than one half inch from the front end of said barrel" (§ 10-131[g]). The Administrative Code also requires "the name of the manufacturer or some trade name, mark or brand by which the manufacturer can be readily identified" to be stamped legibly on the item.

Plaintiff brought this action seeking to permanently enjoin defendants from continuing to violate Administrative Code § 10-131(g) and from maintaining what it contends is a common law nuisance. Supreme Court granted a motion by plaintiff to preliminarily enjoin defendants from distributing the toy guns which, according to plaintiff's brief, are "entirely black in color * * * except for one orange piece at the tip" and fail to carry "any stamp bearing the name of the manufacturer, trade name or brand". Defendants assert, however, and plaintiff does not deny, that the toys are in full compliance with federal legislation governing their coloring and markings.

In 1988, Congress enacted 15 USC § 5001, providing detailed requirements regarding the appearance of non-functional firearms. Insofar as pertinent to the facts of this case, the law prohibits "any person to manufacture, enter into commerce, ship, transport, or receive any toy, look-alike, or imitation firearm" without a "blaze orange plug inserted in the barrel * * * recessed no more than 6 millimeters from the muzzle end of the barrel of such firearm" (15 USC § 5001[a]; [b]). The statute contains a provision captioned "Preemption of State or local laws or ordinances; exceptions", which states: "The provisions of this section shall supersede any provision of State or local laws or ordinances which provide for markings or identification inconsistent with provisions of this section provided that no State shall—(i) prohibit the sale or manufacture of any look-alike, nonfiring, collector replica of an antique firearm developed prior to 1898, or (ii) prohibit the sale (other than prohibiting the sale to minors) of traditional B-B, paint ball, or pellet-firing air guns

that expel a projectile through the force of air pressure" (15 USC 5001[g]).

It is apparent from even a cursory examination of the Administrative Code provision that its requirements for the marking and identification of toy firearms are inconsistent with those contained in the federal statute. It is also hard to imagine a more specific expression of Congressional intent than the preemption of local ordinances that "provide for markings or identification inconsistent with the provisions of this section" (15 USC § 5001[g]). Undeterred by either the obvious inconsistency or the intent of Congress, Supreme Court held that the Administrative Code provision is not inconsistent with federal law because "making a toy gun, red or purple, or yellow or green and putting a manufacturer's label on it could simultaneously be done by a manufacturer together with the assertion of an orange plug, that is if the manufacturer wanted his products sold in the New York City market."

It is irrelevant that a manufacturer might be able to comply with the requirements of both federal and local legislation. As this Court has noted, preemption involves a two-tiered analysis, the first element of which is "whether Congress has indicated the intent to preclude State regulation of the activities" addressed in its enactment (*People v Calandra*, 164 AD2d 638, 641, *lv denied* 77 NY2d 992). Here, the intent of Congress to supersede local legislation regulating the appearance of toy guns is apparent from the face of the statute. In attempting to limit the scope of preemption, Supreme Court relies on cases dealing with implicit, not express, preemption that are inapposite under the circumstances presented by this matter (*see*, *Cipollone v Liggett Group*, __ US __, 112 S Ct 2608; *Florida Lime and Avocado Growers v Paul*, 374 US 858).

In this case, analysis does not proceed to the second tier, which is that, "irrespective of any intent by Congress to exclude State regulation, 'a state statute is void to the extent that it actually conflicts with a valid federal statute' " (*People v Calandra*, *supra*, at 643, quoting *Ray v Atlantic Richfield Co.*, 435 US 151, 158). But, even at this level, the

reasoning employed by Supreme Court is flawed. In deciding if there is an actual conflict, the material consideration is not whether a defendant may be able to simultaneously comply with the requirements of the respective enactments, but that "conduct which is lawful under the Federal statute may be illegal under State law", thereby rendering the local provision a nullity (*id.*). Here, it is not contended that the toy guns placed into commerce by defendants violate the provisions of 15 USC § 5001, only that they violate the provisions of the Administrative Code. Even if the intent to preempt local laws had not been expressly stated by Congress, defendants' sale of the toys is only illegal under the terms of the local provision, and it is therefore superseded by the federal legislation.

The only case interpreting 15 USC § 5001 brought to this Court's attention is *Coalition of New Jersey Sportsmen v Florio* (744 F Supp 602, *supra*). That decision merely applies the statutory bar against state laws prohibiting the sale of "traditional B-B, paint ball, or pellet-firing air guns" (15 USC 5001[g][ii]) which are specifically exempted from its operation. As interpreted by Commerce Department regulations, the statute applies to "toy, look-alike, and imitation firearms" resembling weapons produced since 1898 and does not apply to "(a) Non-firing collector replica antique firearms * * * (b) Traditional B-B, paint-ball, or pellet-firing air guns * * * and (c) Decorative ornamental, and miniature objects" that resemble firearms (15 CFR § 1150.1).

In construing the intent of Congress, Supreme Court misapprehends the language of the preemption provision. By limiting the local ordinances superseded to those that "provide for markings or identification inconsistent with provisions of this section", the statute does not render preemption of local measures that purport to regulate the *appearance* of a toy gun less than absolute. The limitation merely gives the locality the latitude to regulate *other* aspects of the sale of toy guns, and their sale could presumably be banned altogether. However, the locality is absolutely precluded from enforcing regulations, such as those contained in the Administrative Code provision, that bear on such aspects of the toy's design as

its color, its markings and the specifications of the muzzle plug.

It was an abuse of discretion to grant plaintiff's motion for a preliminary injunction. It is well settled that the grant of preliminary relief requires the movant to demonstrate a likelihood of ultimate success on the merits, immediate irreparable injury in the event the relief sought is denied and a preponderance of the equities to effect substantial justice and preserve the status quo (*W.T. Grant Co. v Srogi*, 52 NY2d 496, 517). In view of the explicit preemption provision of the federal statute and the obvious inconsistency between its provisions and those of the Administrative Code, plaintiff failed to demonstrate a likelihood of success on the merits. In addition, plaintiff failed to establish that irreparable injury was immediate. While there is certainly the potential for commission of a crime with a toy that closely resembles an operable weapon, the loss of sales to defendants from the imposition of the injunction is both real and immediate. As Supreme Court acknowledged in its memorandum decision, plaintiff's efforts in exacting defendants' compliance with Administrative Code § 10-131(g) resulted in a loss of sales during the 1933 holiday season, and that impact has now extended through the 1994 holiday period.

It is unfortunate that an innocuous object such as a toy gun can be an instrument of violence and even death. In the dark, even a crude imitation of a gun can employed to commit robbery. The victim of such a ruse may assume the weapon is real and shoot and kill the robber. Police responding to the report of a crime in progress, suddenly confronted with a child carrying a toy weapon, may make the same mistake with tragic consequences to all concerned. However, Congress has weighed the opposing factors of commerce and public safety and enacted a statute encompassing its determination of the competing policy considerations. The enactment is obviously less than a perfect solution to the problem it is designed to alleviate. It is, however, "the supreme law of the land" (US Constitution, Art VI, cl 2), and conflicting state law is "without effect" (*Cipollone v Liggett Group*, *supra*, at 2617).

Accordingly, the order of Supreme Court, New York County (Alice Schlesinger, J.), entered on or about April 12, 1994, which granted plaintiff City of New York's motion for a preliminary injunction, should be reversed and the motion denied, without costs.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 14, 1995

/s/ CATHERINE O'HAGAN WOLFE
Catherine O'Hagan Wolfe
CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. 407282/93

CITY OF NEW YORK,

Plaintiff,

—against—

JOBLOT PUSHCART, JA-RU, WEBER JOB LOT CORPORATION AND MADISON LIMITED,

Defendants.

SCHLESINGER, J.

New York City wants to rid the town of toy look alike guns and believes they should be able to do that via enforcement of a provision of the New York City Administrative Code

In December of this past year, it moved to enjoin several manufacturers and sellers from distributing toy guns in the City which it claimed violated Code Section 10-131(g).

That Code provides in relevant part that it is:

> "unlawful for any person to sell or offer for sale, possess or use or attempt to use or give away, any toy or imitation pistol or revolver which substantially duplicates an actual pistol or revolver, unless said imitation or toy pistol or revolver shall be colored in colors other than black, blue, silver or aluminum . . . " Further, the Code requires: that "every such toy or imitation pistol or revolver hereinafter manufactured, distributed, transported or sold shall have legibly stamped thereon, the name of the manufacturer or some trade name, mark or

brand by which the manufacturer can be readily identified."

The retail distributors, who were included in the action, cooperated with the City's efforts and agreed to remove from their shelves all toys not in compliance with the Code. Because of their actions, fewer such guns were sold during the holiday season lessening, to some extent, the volume of such look alike weapons in the hands of minors and others, some of whom were using these guns in the commission of violent crimes.[1]

JA-RU is a manufacturer of toy guns and distributor of them nationally. Its products include an item which the city alleges violates the Administrative Code. JA-RU, however contends that their toy gun, specifically, a "KG-9" has a blaze orange plug recessed no more than 6 millimeters from the nuzzle end of the barrel, and that this plug brings its product into compliance with a relevant federal law, 15 U.S.C. Section 5001(b)(1) which was enacted in 1988. That statute, counsel for JA-RU argues clearly and expressly preempts the New York City Code and thus would compel this court to deny the plaintiff any injunction vis-a-vis their client.

15 U.S.C. Section 5001 reads in relevant part:

(a) *ACTS PROHIBITED*

It shall be unlawful for any person to manufacture, enter into commerce, ship, transport or receive any toy, look-alike, or imitation firearm unless such firearm contains, or has affixed to it, a marking approved by the Secretary of Commerce, as provided in subsection (b).

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[1] An accompanying affidavit from NYC Police Sergeant Dominic Buccigrossi assigned to the Department's Ballistic Squad contained the data that in the past two years, over 2,000 toy guns were confiscated and in 1992-1993 these toys were used in the commission of numerous serious crimes, including rape, assault and robbery. Further that the NYPD has accumulated statistics relating to the use of toy guns in crime and that during the period from January 1, 1992 through June 30, 1993 the Department recovered 263 toy guns used or possessed during felonious assaults and 195 used in robberies.

(b) *DISTINCTIVE MARKING FOR TOYS, LOOK-ALIKES, AND IMITATION FIREARMS, EXCEPTION, WAIVER, ADJUSTMENTS AND CHANGES*

(1) Except as provided in paragraph (2) or (3), each toy, look-alike, or imitation firearm shall have as an integral part, permanently affixed, a blaze orange plug asserted in the barrel of such toy, look-alike, or imitation firearm. Such plug shall be recessed no more than 6 millimeters from the nuzzle end of the barrel of such firearm.

(2) The Secretary of Commerce may provide for an alternate marking or devise for any toy, look-alike, or imitation firearm not capable of being marked as provided in paragraph (1) and may waive the requirement of any such marking or device for any toy, look-alike or imitation firearm that will only be used in the theatrical, movie or television industry.

(3) The Secretary is authorized to make adjustments and changes in the marking system provided for by this section, after consulting with interested persons.

(C) *LOOK-ALIKE FIREARM DEFINED*

For the purpose of this section, the term "look-alike firearm" means any imitation of any original firearm which was manufactured, designed and produced since 1898, including and limited to toy guns, water guns, replica non-guns, and air-soft guns firing non-metallic projectiles. Such term does not include any look-alike, non-firing, collector replica of an antique firearm developed prior to 1898, or traditional B-B, paint ball or pellet-firing air guns that expel a projectile through the force of air pressure.

(g) *PREEMPTION OF STATE OR LOCAL LAWS OR ORDINANCES, EXCEPTIONS*

The provisions of this section shall supersede any provision of State or local laws or ordinances which provide for marking or identification inconsistent with provisions of this section provided that no state shall

(i) prohibit the sale or manufacture of any lookalike, non-firing, collector replica of an antique firearm developed prior to 1898, or

(ii) prohibit the sale (other than prohibiting the sale to minors) of traditional B-B paint-ball, or pellet-firing air guns that expel a projectile through the force of air pressure."

Federal regulations under 15 C.F.R. Section 1150.1-1150.5 were then promulgated putting into effect the above statute.

As to certain legal principles relevant to this discussion, there should be no dispute. First, that Article VI of the United State Constitution provides that the laws of the United States "shall be the Supreme Law of the Land; . . . any thing in the Constitution or Laws of any state to the contrary notwithstanding".

Pursuant to this clause and decisions going back to the early 1800's, it is clear that when state law and federal law conflict, it is the state law that must give way.

However, hand-in-hand with the supremacy doctrine is the assumption "that the historic police powers of the states are not to be superseded by Federal Act unless that is the clear and manifest purpose of Congress" *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Finally, in light of the strong presumption against preemption of state laws, the courts are obliged to narrowly construe the precise language of federal statutes to determine whether the State or local law is in fact preempted. *Cipollone v. Liggett Group, Inc.*, 112 S. Court 2608 (1992).

In applying these principles to the two laws here involved, I find that the City's Administrative Code, Section 10-131(g) is not in conflict with the Federal law nor did the Congress, by enacting 15 USC Section 5001 intend to preempt the field of toy gun regulation.

In the various opinions cited by the parties, the courts have struck down State and local laws, as preemptive of State regulatory power only when it was persuasively shown "either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained" *Florida Lime and Avocado Growers, Inc. v. Paul*, 83 S. Ct. 1210, 1217 (1993).

Neither is the case here. Section 5001(g) entitled "Preemption of State or Local Laws or Ordinances; Exceptions", the clause pointed to by JA-RU to support their argument of explicit preemption does not compel such a conclusion.

Rather, the words used express the mandate that the statute only supersedes State or local laws when the latter provide for markings which are "inconsistent". Also there are two exceptions or absolute prohibitions affecting specific kinds of firearms (collectors replicas of antiques and traditional B-B, and other pellet-firing air guns).

In fact, in the only reported decision specifically interpreting Section 5001, a United States District Court in New Jersey struck down a New Jersey statute finding that it was in conflict with and thereby preempted by the federal law, Section 5001(g) to the extent that the state sought to regulate B-B, paint-ball or pellet firing air guns which was explicitly precluded (*Coalition of New Jersey Sportsmen v. Florio* 744 F. Supp 602 (1990)).

Are the provisions of the New York City Administrative Code therefore, inconsistent with Federal law? I find that they are not. First, it is clear that the purpose of both the Federal Statute and the City Code are similar in that both seek to prevent the marketing of toy guns which can be confused with real guns.

The defendant may argue that the purpose of the federal statute is larger than this and includes Congressional desire to put in place a scheme so comprehensive so as to displace all state regulations. However, no where in the statute itself, is that intent expressed.

That is quite different from the policy statements actually inserted, for example in the 1965 and 1969 Federal Statutes regulating cigarette labelling discussed in *Cipollone v. Liggett Group, Inc.* (*supra*). There, Section 2 of the 1965 Act explicitly declared the statute's two purposes: 1) to adequately inform the public that cigarette smoking may be hazardous to health and 2) to protect the national economy from the burden imposed by diverse, nonuniform and confusing cigarette labeling and advertising regulations.

Still, despite this clearly declared purpose, the 1965 Statute's Section 5(b)'s words of preemption were given a narrow construction by the Supreme Court. It found that the warning to cigarette buyers required in the Act's Section 4 did not "by its own effect foreclose additional obligations imposed under state law" (pg. 2618). The 1969 statute however contained more inclusive language which the court interpreted to preempt State causes of action. However, the court emphasized it was the explicit words of preemption which counted even when the intent was clearly expressed.

Here, despite some comments and opinions expressed by various Senators who were sponsoring the federal legislation, the Congress elected not to declare its intent. And when the Statute specifically addressed preemption as to non-antique or B-B type guns, the Congress merely limited it to those State and local laws "inconsistent with the provisions".

If New York City precluded toy guns from having any plugs at all or required the plugs to be in a color other than bright orange, that would be inconsistent. In other words a manufacturer could not make his product simultaneously comply with both regulations.

However, making a toy gun, red or purple, or yellow or green and putting a manufacturer's label on it could simultaneously be done by a manufacturer together with the insertion of an orange plug, that is if the manufacturer wanted his products sold in the New York City market. (*See for example*, in this regard the extended discussion of California's law regulating avocados found in *Florida Lime and Avocado Growers, Inc. v. Paul, supra*).

In considering whether to grant a preliminary injunction, a court must consider three factors: 1) the movant's likelihood of success on the merits; 2) whether irreparable harm may occur in the absence of such an injunction, and 3) whether the equities balance in the plaintiff's favor (see, *W.T. Grant v. Srogi*, 52 NY2d 496 (1981).

Here I find that the City meets all three criteria. Based on the earlier discussion, I find that the relevant Administrative Code is viable despite the Federal Statute. Therefore, it is

likely that the City will prevail in its efforts to enforce the Code against JA-RU.

Second, I find that in the absence of an injunction, additional people living and visiting this City will be victimized by individuals using these toy guns to facilitate their commission of violent crimes. These toys, after they were confiscated by City officers, were displayed in court. They were chillingly convincing in their resemblance to real automatic weapons particularly when, with comparative ease, their orange plugs were covered by black adhesive.

Do the equities balance in the plaintiff's favor? Absolutely. A toy gun manufacturer has a right to seek out the lucrative marketplace of New York City but not at the expense and peril of the innocent people living here. If children in this City must play with toy guns, then New York has a right to make sure they appear to be precisely that.

For all the above reasons, the preliminary injunction requested by the City is granted and JA-RU's motion to declare Administrative Code Section 10-131(g) preempted by 15 U.S.C. Section 5001 is denied.

The foregoing decision constitutes the order of the court.

Dated: April 12, 1994

/s/ ALICE SCHLESINGER
Alice Schlesinger
J.S.C.

CHAPTER 76—IMITATION FIREARMS

Sec. 5001. Penalties for entering into commerce of imitation firearms.

(a) Acts prohibited.
(b) Distinctive marking for toys, look-alikes, and imitation firearms, exception; waiver; adjustments and changes.
(c) "Look-alike firearm" defined.
(d) Study of criminal misuse of toy, look-alike, and imitation firearms; report.
(c)[1] Technical evaluation of marking systems.
(f) Effective date.
(g) Preemption of State or local laws or ordinances; exceptions.

§ 5001. Penalties for entering into commerce of imitation firearms

(a) Acts prohibited

It shall be unlawful for any person to manufacture, enter into commerce, ship, transport, or receive any toy, look-alike, or imitation firearm unless such firearm contains, or has affixed to it, a marking approved by the Secretary of Commerce, as provided in subsection (b) of this section.

(b) Distinctive markings for toys, look-alikes, and imitation firearms; exception; waiver; adjustments and changes

(1) Except as provided in paragraph (2) or (3), each toy, look-alike, or imitation firearm shall have as an integral part, permanently affixed, a blaze orange plug inserted in the barrel of such toy, look-alike, or imitation firearm. Such plug shall be recessed no more than 6 millimeters from the muzzle end of the barrel of such firearm.

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[1] So in original.

(2) The Secretary of Commerce may provide for an alternate marking or device for any toy, look-alike, or imitation firearm not capable of being marked as provided in paragraph (1) and may waive the requirement of any such marking or device for any toy, look-alike, or imitation firearm that will only be used in the theatrical, movie or television industry.

(3) The Secretary is authorized to make adjustments and changes in the marking system provided for by this section, after consulting with interested persons.

(c) "Look-alike firearms" defined

For purposes of this section, the term "look-alike firearm" means any imitation of any original firearm which was manufactured, designed, and produced since 1898, including and limited to toy guns, water guns, replica nonguns, and air-soft guns firing nonmetallic projectiles. Such term does not include any look-alike, nonfiring, collector replica of an antique firearm developed prior to 1898, or traditional B-B, paint-ball, or pellet-firing air guns that expel a projectile through the force of air pressure.

(d) Study of criminal misuse of toy, look-alike, and imitation firearms; report

The Director of the Bureau of Justice Statistics is authorized and directed to conduct a study of the criminal misuse of toy, look-alike and imitation firearms, including studying police reports of such incidences and shall report on such incidences relative to marked and unmarked firearms.

(c)[1] Technical evaluation of marking systems

The Director of National Institute of Justice is authorized and directed to conduct a technical evaluation of the marking systems provided for in subsection (b) of this section to determine their effectiveness in police combat situations. The Director shall begin the study within 3 months after Novem-

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[1] So in original. Probably should be "(e)".

ber 5, 1988 and such study shall be completed within 9 months after November 5, 1988.

(f) Effective date

This section shall become effective on the date 6 months after November 5, 1988 and shall apply to toy, look-alike, and imitation firearms manufactured or entered into commerce November 5, 1988.

(g) Preemption of State or local laws or ordinances; exceptions

The provisions of this section shall supersede any provision of State or local laws or ordinances which provide for markings or identification inconsistent with provisions of this section provided that no State shall—

(i) prohibit the sale or manufacture of any look-alike, nonfiring, collector replica of an antique firearm developed prior to 1898, or

(ii) prohibit the sale (other than prohibiting the sale to minors) of traditional B-B, paint ball, or pellet-firing air guns that expel a projectile through the force of air pressure.

(Pub.L. 100-615, § 4, Nov. 5, 1988, 102 Stat. 3190.)

Effective Date

Section effective 6 months after Nov. 5, 1988, applicable to toy, look-alike, and imitation firearms manufactured or entered into commerce after that date, see subsec. (f) of this section.

CODE OF FEDERAL REGULATIONS

TITLE 15—COMMERCE AND FOREIGN TRADE

SUBTITLE B—REGULATIONS RELATING TO COMMERCE AND FOREIGN TRADE

CHAPTER XI—TECHNOLOGY ADMINISTRATION, DEPARTMENT OF COMMERCE

PART 1150—MARKING OF TOY, LOOK-ALIKE AND IMITATION FIREARMS

s 1150.1 Applicability.

This part applies to toy, look-alike, and imitation firearms ("devices") having the appearance, shape, and/or configuration of a firearm and produced or manufactured and entered into commerce on or after May 5, 1989, including devices modelled on real firearms manufactured, designed, and produced since 1898. This part does not apply to:

(a) Non-firing collector replica antique firearms, which look authentic and may be a scale model but are not intended as toys modelled on real firearms designed, manufactured, and produced prior to 1898;

(b) Traditional B-B, paint-ball, or pellet-firing air guns that expel a projectile through the force of compressed air, compressed gas or mechanical spring action, orials standard F 589-85, Standard Consumer Safety Specification for Non-Powder Guns, June 28, 1985. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from the American Society for Testing and Materials, 1916 Race Street, Philadelphia, PA 19103. Copies may be inspected at the office of the Associate Director for Industry and Standards, National Institute for Standards and Technology, Gaithersburg, Maryland, or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC; and

(c) Decorative, ornamental, and miniature objects having the appearance, shape and/or configuration of a firearm, including those intended to be displayed on a desk or worn on bracelets, necklaces, key chains, and so on, provided that the objects measure no more than thirty-eight (38) millimeters in height by seventy (70) millimeters in length, the length measurement excluding any gun stock length measurement.

[57 FR 48453, Oct. 26, 1992]

s 1150.2 Prohibitions.

No person shall manufacture, enter into commerce, ship, transport, or receive any toy, look-alike, or imitation firearm ("device") covered by this Part as set forth in s 1150.1 of this part unless such device contains, or has affixed to it, one of the markings set forth in s 1150.3 of this part, or unless this prohibition has been waived by s 1150.4 of this part.

s 1150.3 Approved markings.

The following markings are approved by the Secretary of Commerce:

(a) A blaze orange (Federal Standard 595a, February, 1987, color number 12199, issued by the General Services Administration) or orange color brighter than that specified by the federal standard color number, solid plug permanently affixed to the muzzle end of the barrel as an integral part of the entire device and recessed no more than 6 millimeters from the muzzle end of the barrel. This incorporation by reference was approved by the Director of the Federal Register in accordance with U.S.C. 552(a) and 1 CFR part 51. Copies of Federal Standard 595a may be obtained from the Office of Engineering and Technical Management, Chemical Technology Division, Paints Branch, General Services Administration, Washington, DC 20406. Copies may be inspected at the Office of the Associate Director for Industry and Standards, National Institute for Standards and Technology, Gaithers-

burg, Maryland, or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(b) A blaze orange (Federal Standard 595a, February, 1987, color number 12199, issued by the General Services Administration) or orange color brighter than that specified by the Federal Standard color number, marking permanently affixed to the exterior surface of the barrel, covering the circumference of the barrel from the muzzle end for a depth of at least 6 millimeters. This incorporation by reference was approved by the Director for the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of Federal Standard 595a may be obtained from the Office of Engineering and Technical Management, Chemical Technology Division, Paints Branch, General Services Administration, Washington, DC 20406. Copies may be inspected at the Office of the Associate Director for Industry and Standards, National Institute for Standards and Technology, Gaithersburg, Maryland, or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(c) Construction of the device entirely of transparent or translucent materials which permits unmistakable observation of the device's complete contents.

(d) Coloration of the entire exterior surface of the device in white, bright red, bright orange, bright yellow, bright green, bright blue, bright pink, or bright purple, either singly or as the predominant color in combination with other colors in any pattern.

[57 FR 48454, Oct. 26, 1992]

s 1150.4 Waiver.

The prohibitions set forth in s 1150.2 of this part may be waived for any toy, look-alike or imitation firearm that will be used only in the theatrical, movie or television industries. A request for such a waiver should be made, in writing, to the Chief Counsel for Technology, United States Department of Commerce, Washington, DC 20230. The request must include

a sbe used only in the theatrical, movie or television industry. A sample of the item must be included with the request.

[57 FR 48454, Oct. 26, 1992]

s 1150.5 Preemption.

In accordance with section 4(g) of the Federal Energy Management Improvement Act of 1988 (15 U.S.C. 5001(g)), the provisions of section 4(a) of that Act and the provisions of this part supersede any provision of State or local laws or ordinances which provides for markings or identification inconsistent with the provisions of section 4 of that Act or the provisions of this part.

FEDERAL REGISTER / VOL. 57, NO. 207 / MONDAY OCTOBER 6, 1992 / RULES AND REGULATIONS

DEPARTMENT OF COMMERCE

Technology Administration

15 CFR Part 1150

[Docket No. 910931-2204]

RIN 0692-AA11

Marketing of Toy, Look-Alike, and Imitation Firearms

AGENCY: Technology Administration, Commerce.

ACTION: Final Rule.

SUMMARY: The Technology Administration of the United States Department of Commerce is today issuing a final rule to change regulations pertaining to marking requirements for toy, look-alike, and imitation firearms. These regulations were promulgated in May of 1989, and implement section 4 of the Federal Energy Management Improvement Act of 1988 ("Act") which prohibits the manufacturing, entering into commerce, shipping, transporting, or receipt of any toy, imitation, or look-alike firearm ("device") unless such device contains, or has affixed to it, a marking approved by the Secretary of Commerce. The Technology Administration published a notice of a proposed rulemaking to revise the regulations on November 7, 1991 (56 FR 56953). After consideration of public comments received in response to that proposed rulemaking, the Technology Administration is today promulgating this final rule amending the regulations. It sets out additional permissible markings, and further defines those devices covered by the regulation.

DATES: This rule is effective October 26, 1992.

FOR FURTHER INFORMATION CONTACT: Bradford C. Brown, Chief Counsel for Technology, telephone number (202) 482-1984, FAX (202) 482-0253.

SUPPLEMENTARY INFORMATION:

Background

On November 7, 1991 the Technology Administration published a Notice of Proposed Rulemaking in the Federal Register (56 FR 56953) announcing proposed revisions to regulations found at 15 CFR Part 1150, which implement section 4 of the Federal Energy Management Improvement Act of 1988, pertaining to the marking of toy, look-alike, and imitation firearms. The public comment period of 60 days was subsequently extended to March 17, 1992 in a Federal Register notice published on January 17, 1992 (57 FR 2065).

Section 4(a) of the Federal Energy Management Improvement Act of 1988 provides that it shall be unlawful for any person to manufacture, enter into commerce, ship, transport, or receive any toy, look-alike, or imitation firearm unless such firearm contains, or has affixed to it a marking approval by the Secretary of Commerce. (15 U.S.C. 5001(a)). Section 4(b)(1) of the Act establishes as an initial acceptable marking a permanently affixed, blaze orange plug inserted in the barrel of the toy, look-alike, or imitation firearm, recessed no more than 8 millimeters from the muzzle end of the barrel, and made an integral part of the device. (15 U.S.C. 5001(b)(1)). Section 4(b)(2) authorizes the Secretary to approve an alternative marking for any toy, look-alike, or imitation firearm not capable of being marked with the requisite blaze orange plug and to waive the marking requirements for any toy, look-alike, or imitation firearm that will only be used in the theatrical, movie or television industries. (15 U.S.C. 5001(b)(2)). Section 4(b)(3) authorizes the Secretary to adjust or charge the marking system established pursuant to sections 4(b)(1) and (2), after consultation with interested persons. (15 U.S.C. 5001(b)(3)).

In May of 1989 the Technology Administration promulgated a regulation found at 15 CFR part 1150, to implement the Act. That regulation maintained the blaze orange plug marking established by section 4(b)(1) of the Act and estab-

lished as an alternative marking system for water guns, air-soft guns, light emitting guns or other ejecting toy, look-alike, or imitation firearms which, as such, cannot be marked with a plug in the muzzle end of the barrel because it would restrict the opening necessary to discharge such things as water, non-metallic projectiles, and light, a blaze orange marking permanently affixed to the exterior surface of the barrel and covering the circumference of the barrel and extending from the muzzle end for a depth of at least 6 millimeters. Part 1150 also adjusted the statutory marking system by permitting three other methods of marking for use in the alternative irrespective of whether the device could be marked with the blaze orange plug or blaze orange muzzle marking. The three alternatives were to mark the device at manufacture by; (1) Constructing it entirely of transparent or translucent materials which permit unmistakable observation of the device's complete contents; (2) permanently coloring the entire exterior surface of the device bright red, bright orange, bright yellow, bright green, or bright blue, either singly or as the predominant color in combination with other colors in any pattern; or (3) permanently coloring the entire exterior surface of the device predominantly in white in combination with one or more of the colors bright red, bright orange, bright yellow, bright green, or bright blue in any pattern. These alternatives were selected because they represent standard industry practice for most toy, look-alike, and imitation firearms and, in the opinion of those consulted, are sufficient to identify the device as a toy, look-alike, or imitation firearm rather than as a real firearm.

Description and Explanation of Proposed Changes

The notice of proposed rulemaking published in November of 1991 proposed seven changes to 15 CFR part 1150.

First, § 1150.1 was proposed to be amended by restating the applicability of the regulation to include only those devices which had the "appearance, shape, and/or configuration of a firearm"; as originally promulgated, the regulation applied to

devices which had the "general appearance, shape, and/or configuration of a firearm." This change was proposed to remove ambiguity from the regulation. The work "toy" which appeared in line ten (10) of this section was deleted so as to conform with 15 U.S.C. 5001.

Second, a definition of "collector replica" was proposed in order to distinguish between replicas which were intended to be collectable reproductions and imitation firearms modelled after antique firearms but not intended to be used as collector replicas. The distinction was made because collector replicas are specifically exempted under the regulation whereas toy, lookalike, or imitation firearms which are not intended to be used as collector replicas must meet the requirements of the regulation.

Third, an exception was proposed in § 1150.1 to clarify that part 1150 was not applicable to "decorative, ornamental, and miniature objects having the appearance, shape and/of configuration of a firearm, including those intended to be displayed on a desk or worn on bracelets, necklaces, key chains, and so on, provided that the miniatures measure no more than thirty-eight (38) millimeters in height by seventy (70) millimeters in length." This change was proposed to remove certain imitation firearms from the coverage of the rule because they were so small in size that they could not be mistaken for real firearms. These particular dimensions were selected because the Technology Administration, after consulting with the Bureau of Alcohol, Tobacco and Firearms, was not able to identify any firearms of lesser size that were capable of functioning as a real gun. Metric units were used to conform with the Metric Conversion Act.

Fourth, changes were proposed to be made to § 1150.3(a) and (b) to allow the approved plug or marking at the muzzle end of the barrel to be either "blaze orange" (Federal Standard 595a. February, 1987, color number 12199, issued by the General Services Administration) or an orange color brighter than that specified by the Federal Standard color number. This change was proposed to prevent enforcement actions involv-

ing goods that had bright orange markings in keeping with the intent of the regulation, but did not meet the exact standard for "blaze orange" set forth in the regulation.

Fifth, a change was proposed to be made to § 1150.3(b) to remove the requirement that the imitation gun have an opening used to discharge water, nonmetallic projectiles, or light to get approval for a collar-type marking (§ 1150.3(b)). With the proposed change, whether or not the gun emitted light, water, etc., the collar-type marking could be used.

Sixth, several alternative markings were proposed to be added to the list of approved alternative markings, which included coloration of the entire exterior surface in white, bright pink or bright purple. These additional colors were deemed bright enough that their inclusion in the approved markings list was appropriate. The alternative markings provision was also clarified to include colorations of the entire surface singly or in combination with the approved colors. Deletion of § 1150.3(e) was proposed in order to eliminate redundancy.

Finally, an administrative mechanism for the processing of waiver requests was proposed to be added to § 1150.4 that waives part 1150 for any toy, look-alike, or imitation firearm to be used only in the theatrical, movie or television industries. The proposed mechanism was that requests for waivers be made, in writing, to the Chief Counsel for Technology, United States Department of Commerce, and that the request include a sworn affidavit which stated with specificity the factual circumstances, and that the toy, look-alike or imitation firearm was to be used only in the theatrical, movie or television industry. It was anticipated that such a statement would include the place of manufacture, and a discussion of the specific use and disposition of the items. As originally promulgated, part 1150 contained a "self-enforcing" waiver provision. This approach, however, had proven impractical, imports of noncompliant toy, look-alike, and imitation firearms were routinely prevented at the port of entry by the U.S. Customs Service.

The Technology Administration held a public meeting at the Greater Los Angeles World Trade Center on the proposed amendments and changes to the safety marking system for toy, look-alike, and imitation firearms on December 2, 1991 (56 FR 57869 Nov. 14, 1991). The meeting was attended by a number of representatives of trade associations, manufacturers, importers, distributors and Federal Agencies. Many attenders brought samples of toy, look-alike, or imitation firearms. Most of the pertinent comments made at this meeting are reflected in the written comments received in response to the notice of proposed rulemaking.

Analysis of Comments Received

In response to the November 7, 1991 Notice of Proposed Rulemaking the Technology Administration received comments from six manufacturers, vendors, or their representatives or attorneys. None of the commenters fully supported all of the proposed changes and each commenter made recommendations with respect to the proposed changes.

The four main comments regarding the proposed changes were first, the term "collector replica" was not properly defined; second, the miniature size requirements were too restrictive; third, the colors and coloration were not clearly defined and fourth, the waiver process was overly burdensome. The first and second issues were each raised by four commenters, the third issue by three commenters and the fourth issue by two commenters.

The fourth comments received on the "collector replica" definition in § 1150.1 took issue with toys being excluded from the definition. Their position was that the pre-1898 dated in 15 U.S.C. 5001(c) defined the term "collector replica" and that a toy modelled after any original firearm which was manufactured, designed, and produced prior to 1898 should also be exempted from the regulation. The statute, however, exempts only look-alike, nonfiring, collector replicas modelled on antique firearms developed prior to 1898 from the requirement and does not explicitly exempt toys,

look-alike, or imitation firearms that are not "collector replicas." Support for this interpretation of "collector replica" is present in the Congressional Record (134 Cong. Rec. H10072 (daily ed. October 11, 1988)) in which Congressman Moorhead states that the marking requirement would not apply to manufacturers who produced replicas which resemble pre-1898 firearms, "the realistic look of the object and whose expensive replicas are almost never involved in crimes or accidental shootings by the police." As a result of this clear statutory guidance and legislative history, the definition of "collector replica" in the final rule is adopted as proposed.

Four comments specifically addressed the miniature size exemption in § 1150.1(c). The toy manufacturers, importers, vendors and their representatives argued that the size limit of 38 millimeters in height by 70 millimeters in length was too narrow of an exemption. Their position was that the relative size of the miniature to the original gun size is key to the perception of a working firearm and that the measurements specified in the proposed changes were arbitrary. The 38 millimeter by 70 millimeter dimensions were selected because the Technology Administration, after consultation with the Bureau of Alcohol, Tobacco and Firearms, had not identified any firearms of lesser size that were capable of functioning as real guns. Arguments by the commenters addressing toy, look-alike, or imitation guns with stocks such as rifles, shot guns, and machine guns were also considered and since the stock is not part of the firing mechanism, language dealing with miniature guns with stocks has been added to the final rule. The term "miniatures" in line 7 of this section in the proposed rule has been changed to "objects" so that the applicability of this section to decorative and ornamental miniatures is clarified. The rest of the proposed changes to this section remain the same in the final rule.

The third class of comments received dealt with colors which appear in § 1150.3(c). One comment addressed the subjective "brightness" standard of the colors and two comments addressed the combination of the specified colors. The com-

menter who was concerned with the brightness standard suggested the use of pantone colors, which the commenter stated is the accepted coloring norm in almost every industry. He went on to explain that a list of acceptable shades or brighter shades for a particular color could be used as the standard. After considering these comments, the Technology Administration, however, believes that such an exact list of colors is too restrictive and that the subjective standard for bright used in this section allows for flexibility in enforcement of the regulation. The other concern expressed regarding color was that the proposed regulation provided for coloration of the device in the listed colors "either singly or in combinations of these colors in any pattern", thus restricting the colors to be used to only those enumerated in the regulation. The original regulations provided for coloration of the device in the listed colors "either singly or as the predominant color in combination with other colors in any pattern." It is the Technology Administration's opinion that having the device's surface predominantly colored in the listed colors is sufficient to distinguish a toy gun from a real gun. This change in the coloration policy of having the coloration be predominantly rather than only the approved listed colors is reflected in the final rule.

The fourth category of comments addressed the waiver process as provided for in § 1150.4. Two commenters argued that the detailed waiver procedure set forth in the proposed regulations could be required more than once for a particular item: that is, each time a person manufactured, entered into commerce, shipped, transported or received a look-alike firearm to be used in the theatrical, movie or television industry. It is, however, the Technology Administration's position that once a waiver has been provided and approved, this waiver would be sufficient for all levels of commerce. A second related issue argued by the commenters regarding this section of the proposed regulations was that the specific factual circumstances requirement for the items listed in the affidavit was overly burdensome. The specificity requirement has therefore been removed from the final regulation so that only

a general affidavit swearing to the fact that the toy, look-alike, or imitation firearm will be used only in the theatrical, movie or television industry is necessary.

Additional Information

The final rule sets out additional permissible markings, and further defines those devices covered by the regulation. Accordingly, since the rule thus grants or recognizes an exemption and relieves restrictions, under section 553(d) of the Administrative Procedure Act (5 U.S.C. 553(d)) it may and is being made effective without a 30-day delay in effective date.

Executive Order 12291

The Under Secretary for Technology has determined that this rule is not a major rule within the meaning of section 1(b) of Executive Order 12291 because it will not result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, state or local government agencies or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Therefore, preparation of a Regulatory Impact Analysis is not required under Executive Order 12291.

Executive Order 12612

This rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612.

Executive Order 12372

This rule does not involve Federal financial assistance, direct Federal development, or the payment of any matching funds from a state or local government. Accordingly, the requirements of Executive Order 12372 are not applicable to this rule.

Executive Order 12630

This rule does not pose significant takings implications within the meaning of Executive Order 12630.

Regulatory Flexibility Act

The General Counsel of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration when this rule was proposed that if the rule was adopted, it would not have a significant economic impact on a substantial number of small entities because the alternative markings conform to existing industry practices for most toy, look-alike, and imitation firearms, thus reducing the rule's impact to only where such practices are not followed. As a result, a Regulatory Flexibility Analysis was not required to be prepared under the Regulatory Flexibility Act.

Paperwork Reduction Act

This rule does not contain information collection requirements subject to the Paperwork Reduction Act.

National Environmental Policy Act

This rule will not significantly affect the quality of the human environment. Therefore, an environmental assessment or Environmental Impact Statement is not required to be prepared under the National Environment Policy Act of 1969.

List of Subjects in 15 CFR Part 1150

Commerce, Business and industry, Labeling, Hobbies, Imports, Exports, Shipping, Toys, Transportation, Freight, Incorporation by reference.

Dated: October 19, 1992

Robert M. White
Under Secretary for Technology

For reasons set forth in the preamble, title 15, subtitle B. chapter XI, part 1150 of the Code of Federal Regulations is amended as follows:

CHAPTER XI—TECHNOLOGY ADMINISTRATION, DEPARTMENT OF COMMERCE

PART 1150—MARKING OF TOY, LOOK-ALIKE AND IMITATION FIREARMS

1. The authority citation for part 1150 continues to read as follows:

Authority: Section 4 of the Federal Energy Management Improvement Act of 1983, 15 U.S.C. 5001.

2. Section 1150.1 is revised to read as follows:

§ 1150.1 Applicability

This part applies to toy, look-alike, and imitation firearms ("devices") having the appearance, shape, and/or configuration of a firearm and produced or manufactured and entered into commerce on or after May 5, 1989, included devices modelled on real firearms manufactured, designed, and produced since 1898. This part does not apply to:

(a) Non-firing collector replica antique firearms, which look authentic and may be a scale model but are not intended as toys modelled on real firearms designed, manufactured, and produced prior to 1898:

(b) Traditional B-B, paint-ball, or pellet-firing air guns that expel a projectile through the force of compressed air, compressed gas or mechanical spring action, or any combination thereof, as described in American Society for Testing and Materials standard F589-85, Standard Consumer Safety Specification for Non-Powder Guns, June 28, 1985. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from the American Society for Testing and Materials, 1916 Race Street, Philadelphia, PA 19103. Copies may be inspected at the office of the Associate Director for Industry and Standards, National Institute for Standards and Technology, Gaithersburg, Maryland, or at the Office of the Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC; and

(c) Decorative, ornamental, and miniature objects having the appearance, shape and/or configuration of a firearm, including those intended to be displayed on a desk or worn on bracelets, necklaces, key chains, and so on, provided that the objects measure no more than thirty-eight (38) millimeters in height by seventy (70) millimeters in length, the length measurement excluding any gun stock length measurement.

3. Section 1150.3 is amended by removing paragraph (e) and by revising paragraphs (a), (b), and (d) to read as follows:

§ 1150.3 Approved markings.

The following markings are approved by the Secretary of Commerce:

(a) A blaze orange (Federal Standard 595a, February, 1987, color number 12199, issued by the General Services Administration) or orange color brighter than that specified by the federal standard color number, solid plug permanently affixed to the muzzle end of the barrel as an integral part of the entire device and recessed no more than 6 millimeters from the muzzle end of the barrel. This incorporation by reference was approved by the Director of the Federal Register in accor-

dance with U.S.C. 552(a) and 1 CFR part 51. Copies of Federal Standard 595a may be obtained from the Office of Engineering and Technical Management, Chemical Technology Division, Paints Branch, General Services Administration, Washington, DC 20406. Copies may be inspected at the office of the Associate Director for Industry and Standards, National Institute for Standards and Technology, Gaithersburg, Maryland, or at the Office of the Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC.

(b) A blaze orange (Federal Standard 595a, February 1987, color number 12199, issued by the General Services Administration) or orange color brighter than that specified by the Federal Standard color number, marking permanently affixed to the exterior surface of the barrel, covering the circumference of the barrel from the muzzle end for a depth of at least 6 millimeters. This incorporation by reference was approved by the Director for the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR, part 51. Copies of Federal Standard 595a may be obtained from the Office of Engineering and Technical Management, Chemical Technology Division, Paints Branch, General Services Administration, Washington, DC 20406. Copies may be inspected at the office of the Associate Director for Industry and Standards, National Institute for Standards and Technology, Gaithersburg, Maryland, or at the Office of the Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC.

(c) * * *

(d) Coloration of the entire exterior surface of the device in white, bright red, bright orange, bright yellow, bright green, bright blue, bright pink, or bright purple, either singly or as the predominant color in combination with other colors in any pattern.

4. Section 1150.4 is revised to read as follows:

§ 1150.4 Waiver.

The prohibitions set forth in § 1150.2 of this part may be waived for any toy, look-alike or imitation firearm that will be used only in the theatrical, movie or television industries. A request for such a waiver should be made, in writing, to the Chief Counsel for Technology, United States Department of Commerce, Washington, DC 20230. The request must include a sworn affidavit which states that the toy, look-alike, or imitation firearm will be used only in the theatrical, movie or television industry. A sample of the item must be included with the request.

* * *

FEDERAL REGISTER / VOL. 54, NO. 86 / FRIDAY MAY 5, 1989

Technology Administration

15 CFR Part 1150

[Docket No. 90248-9104]

Marking of Toy, Look-Alike and Imitation Firearms

AGENCY: Technology Administration, Commerce.

ACTION: Final rule.

SUMMARY: The Technology Administration of the United States Department of Commerce is today issuing a final rule to implement section 4 of the Federal Energy Management Improvement Act of 1988 ("Act") (Pub. L. 100-815) which prohibits the manufacturing, transporting, or receipt of any toy, imitation or look-alike firearm ("device") unless such device contains, or has affixed to it, a marking approved by the Secretary of Commerce. The final rule maintains the method of marking established by section 4(b)(1) of the Act and establishes an alternative method of marking when a device is not capable of being marked by the method established by section 4(b)(1) and three alternative methods of marking which may be used in all instances. In addition, the

rule waives marking requirements for any toy, look-alike, or imitation firearm that will be used only in the theatrical, movie, or television industries.

DATE: This rule is effective May 5, 1989. The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of May 5, 1989.

FOR FURTHER INFORMATION CONTACT: Dr. Stanley I. Warshaw, Associate Director for Industry and Standards, National Institute of Standards and Technology, telephone number (301) 975-4000, FAX (301) 926-0647.

SUPPLEMENTARY INFORMATION: Section 4(a) of the Federal Energy Management Improvement Act of 1988 provides that "it shall be unlawful for any person to manufacture, enter into commerce, ship, transport, or receive any toy, look-alike, or imitation firearm unless such firearm contains, or has affixed to it, a marking approved by the Secretary of Commerce * * *" (15 U.S.C. 5001(a).) Section 4(b)(1) of the Act establishes as an initial acceptable marking a permanently affixed, blaze orange plug inserted in the barrel of the toy, look-alike, or imitation firearm, recessed no more than 6 millimeters from the muzzle end of the barrel, and made an integral part of the device. (15 U.S.C. 5001(b)(1).) Section 4(b)(2) authorizes the Secretary to approve an alternative marking for any toy, look-alike, or imitation firearm not capable of being marked with the requisite blaze orange plug, and to waive the marking requirements for any toy, look-alike, or imitation firearm that will only be used in the theatrical, movie, or television industries. (15 U.S.C. 5001(b)(2).) Section 4(b)(3) authorizes the Secretary to adjust or change the marking system established pursuant to sections 4(b)(1) and (2), after consultation with interested persons. (15 U.S.C. 5001(b)(3).)

The Technology Administration held a public workshop at the National Institute of Standards and Technology on February 9, 1989, on the marking requirements of the Act. (See 53

FR 50987, Dec. 19, 1988.) The workshop was attended by forty representatives of trade associations, manufacturers, importers, distributors and Federal Agencies. Many attendees brought samples of toy, look-alike or imitation firearms. Although not requested, written comments were received in advance and subsequent to the workshop.

Based on the comments received and consultations at the workshop and elsewhere with trade associations, manufacturers, importers, distributors, retailers, police chiefs, and Federal Agencies, the Under Secretary for Technology published a Notice of Proposed Rulemaking in the Federal Register on March 14, 1989 (54 FR 10550). The notice proposed to maintain the blaze orange plug marking established by section 4(b)(1) of the Act and establish as an alternative marking system for water guns, air-soft guns, light emitting guns or other ejecting toy, look-alike or imitation firearms which, as such, cannot be marked with a plug in the muzzle end of the barrel because it would restrict the opening necessary to discharge such things as water, non-metallic projectiles, and light, a blaze orange marking permanently affixed to the exterior surface of the barrel and covering the circumference of the barrel and extending from the muzzle end for a depth of at least 6 millimeters. The notice also proposed to adjust the statutory marking system by permitting three other methods of marking for use in the alternative irrespective of whether the device could be marked with the blaze orange plug or blaze orange muzzle marking. The three alternatives proposed were to mark the device at manufacture by:

(1) Constructing it entirely of transparent or translucent materials which permit unmistakable observation of the device's complete contents; (2) permanently coloring the entire exterior surface of the device bright red, bright orange, bright, yellow, bright green, or bright blue either singly or as the predominant color in combination with other colors in any pattern; or (3) permanently coloring the entire exterior surface of the device predominantly in white in combination with one or more of the colors bright red, bright orange, bright, yellow,

bright green, or bright blue in any pattern. These alternatives were selected because they represent standard industry practice for most toy, look-alike and imitation firearms and in the opinion of those consulted, are sufficient to identify the device as a toy, look-alike or imitation firearm rather than as a real firearm. Finally, the notice proposed to waive marking requirements for any toy, look-alike or imitation firearm that will only be used in the theatrical, movie or television industries.

Section 4(c) of the Act specifically excludes from the Act's marking requirements or any marking requirements or any marking requirements established thereunder look-alike, non-firing, collector replicas of antique firearms designed, manufactured, and produced prior to 1898, and traditional B-B, paint-ball, or pellet-firing air guns that expel a projectile through the force of air pressure. (15 U.S.C. 5001(c).) However, it is clear from the legislative history of section 4 that it was the intent of Congress to also exclude from marking requirements traditional B-B, piant-ball, and pellet-firing air guns that expel a projectile through the force of compressed gas or mechanical spring action, or a combination thereof. Accordingly, the notice proposed to exclude from marking requirements look-alike, non-firing, collector replicas of antique firearms designed, manufactured, and produced prior to 1898, and traditional B-B, paint-ball, or pellet-firing air guns that expel a projectile through the force of compressed air, compressed gas or mechanical spring action, or any combination thereof.

In response to the March 14, 1989 Notice of Proposed Rulemaking, the Technology Administration received twenty-eight comments, five from manufacturers, vendors, or their representatives or attorneys; ten from police officials at various levels of government; four from State legislators and executive officials; seven from interested members of the public; and two from elements of the U.S. Government. Eight of the commenters fully supported the regulation, thirteen supported the regulation but recommended changes, four took

the position that a total ban on realistic toy guns was necessary and therefore opposed the regulation as too weak, and three took no position.

The two most frequent comments about the regulation were, first, that the marking requirements should be changed to eliminate the recessed orange plug as an acceptable marking, and second, that a complete ban on realistic toy guns was needed. Eight commenters raised the first issue and five raised the second. No changes are being made to the regulations at this time as a result of either comment. The Technology Administration is awaiting the results of a study by the Director of the National Institute of Justice, mandated by section 4(e) of the Act, before deciding whether to remove the recessed orange plug as an acceptable marking. That study is a technical evaluation of the marking system established by the Act and of the alternative marking systems being implemented by this regulation. The Act requires that study to be completed within nine months of enactment, or no later than August 5, 1989. With respect to the comments requesting a complete ban on realistic toy guns, the Secretary of Commerce has no authority under the Act to take such action.

Other comments received are described below, listed by commenter. Among the five manufacturers, vendors, and their representatives, all generally supported the methods of marking contained in the proposed regulation. However, three requested changes in § 1150.1 "Applicability" of the regulation to make clear the intent of Congress that the regulation did not apply to toy, look-alike or imitation firearms that are non-firing replicas of an antique firearm modeled on a real firearm designed, manufactured, and produced prior to 1989. The final regulation has been revised to accommodate this request. One commenter requested an exemption from the regulations for airguns and look-alike guns marketed to the adult buyer; another commenter requested that section 1150.5, dealing with preemption of marking requirements by state and local governments, be strengthened. These requested changes have not been made, because the Secretary of Commerce has no authority under the Act to make the requested changes.

Among the ten police officials, all generally supported the proposed regulation, although as discussed above, six of the ten questioned the effectiveness of a recessed orange plug without additional marking. In addition, five of the ten commenters suggested the inclusion of BB guns and the like under the scope of the regulation. Because the exclusion of BB guns is statutorily mandated by section 4(c) of the Act, the requested change was not made.

Four comments were received from representatives of state governments, three supporting the regulation and one opposing it. The Consumer Protection Board of one state fully supported the regulation, as did the Department of Human Resources of a second state. The Consumer Council of a state Department of Agriculture supported the alternative marking schemes, but questioned the utility of the recessed blaze orange plug, recommending elimination of that method of marking. One state Senator opposed the regulation, strongly supporting in its place a total ban on toy guns and look-alikes.

Seven comments were received from the general public, four generally supporting the regulation and three preferring a total ban on toy guns and look alikes. Finally, materials were received from Senator Cranston of California and the National Institute of Justice, neither of which specifically commented on the regulation.

The final rule repeats the blaze orange plug method of marking established by the Act and repeats the preemption set forth in the statute. In all other respects it grants waivers and allows less restrictive methods of marking. Accordingly, since the rule thus grants or recognizes an exemption and relieves restrictions, under section 553(d) of the Administrative Procedure Act (5 U.S.C. 553(d)) it may and is being made effective without a 30 day delay in effective date.

FEDERAL REGISTER / VOL. 54, NO. 86 / FRIDAY MAY 5, 1989 / RULES AND REGULATIONS

CHAPTER XI—TECHNOLOGY ADMINISTRATION, DEPARTMENT OF COMMERCE

PART 1150—MARKING OF TOY, LOOK-ALIKE AND IMITATION FIREARMS

Sec.

1150.1 Applicability.
1150.2 Prohibitions.
1150.3 Approved markings.
1150.4 Waiver.
1150.5 Preemption.

Authority: Section 4 of the Federal Energy Management Improvement Act of 1966, 15 U.S.C. 5001.

§ 1150.1 Applicability.

This part applies to toy, look-alike and imitation firearms ("devices") having the general appearance, shape, and/or configuration of a firearm and produced or manufactured and entered into commerce on or after May 5, 1989, including devices modelled on real firearms manufactured, designed, and produced since 1896. This part does not apply to any toy, look-alike, or imitation firearm that is a non-firing replica of an antique firearm modelled on a real firearm designed, manufactured, and produced prior to 1898, nor to traditional B-B, paint-ball, or pellet-firing air guns that expel a projectile through the force of compressed air, compressed gas or mechanical spring action, or any combination thereof, as described in American Society for Testing and Materials standard F 589-85, *Standard Consumer Safety Specification for Non-Powder Guns*, June 28, 1985. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. Copies may be obtained from the American Society for Testing and Materials, 1916 Race Street, Philadelphia, Pa. 19103.

Copies may be inspected at the office of the Associate Director for Industry and Standards, National Institute for Standards and Technology, Gaithersburg, Maryland, or at the Office of the Federal Register, 1100 L Street, NW, Room 8401, Washington, DC.

§ 1150.2 Prohibitions.

No person shall manufacture, enter into commerce, ship, transport, or receive any toy, look-alike, or imitation firearm ("device") covered by this Part as set forth in § 1150.1 of this part unless such device contains, or has affixed to it, one of the markings set forth in § 1150.3 of this part, or unless this prohibition has been waived by § 1150.4 of this part.

§ 1150.3 Approved markings.

The following markings are approved by the Secretary of Commerce:

(a) A blaze orange (*Federal Standard 595a, February, 1987, color number 12198*, issued by the General Services Administration) solid plug permanently affixed to the muzzle end of the barrel as an integral part of the entire device and recessed no more than 6 millimeters from the muzzle end of the barrel. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. Copies of Federal Standard 595a may be obtained from the Office of Engineering and Technical Management, Chemical Technology Division, Paints Branch, General Services Administration, Washington DC 20406. Copies may be inspected at the office of the Associate Director for Industry and Standards, National Institute for Standards and Technology, Gaithersburg, Maryland, or at the Office of the Federal Register, 1100 L Street, NW, Room 8401, Washington DC.

(b) For any water gun, air-soft gun, light-emitting gun or other ejecting toy, look-alike or imitation firearm having an opening to discharge such things as water, non-metallic pro-

jectiles, and light, a blaze orange (*Federal Standard 595a, February, 1987, color number 12199*, issued by the General Services Administration) marking permanently affixed to the exterior surface of the barrel, covering the circumference of the barrel from the muzzle end for a depth of at least 6 millimeters. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. Copies of Federal Standard 595a may be obtained from the Office of Engineering and Technical Management, Chemical Technology Division, Paints Branch, General Services Administration, Washington, DC 20406. Copies may be inspected at the office of the Associate Director for Industry and Standards, National Institute for Standards and Technology, Gaithersburg, Maryland, or at the Office of the Federal Register, 1100 L Street, NW, Room 8401, Washington, DC.

(c) Construction of the device entirely of transparent or translucent materials which permits unmistakable observation of the device's complete contents.

(d) Coloration of the entire exterior surface of the device in bright red, bright orange, bright yellow, bright green, or bright blue, either singly or as the predominant color in combination with other colors in any pattern.

(e) Coloration of the entire exterior surface of the device predominantly in white in combination with one or more of the colors bright red, bright orange, bright yellow, bright green, or bright blue in any pattern.

§ 1150.4 Waiver.

The prohibitions set forth in § 1150.2 of this part are waived for any toy, look-alike or imitation firearm that will be used only in the theatrical, movie or television industries.

§ 1150.5 Preemption.

In accordance with section 4(g) of the Federal Energy Management Improvement Act of 1988 (15 U.S.C. 5001(g)), the

provisions of section 4(a) of that Act and the provisions of this part supersede any provision of State or local laws or ordinances which provides for markings or identification inconsistent with the provisions of section 4 of that Act or the provisions of this part.

(g) To possess or carry any instrument or device to discharge or emit such gas or liquid ..... Five dollars

f. Violations. Except as is otherwise specifically provided in this section, any person who shall wilfully violate any of the provisions of this section shall, upon conviction, be punished by a fine of not more than fifty dollars, or by imprisonment not exceeding thirty days, or by both such fine and imprisonment.

g. It shall be unlawful for any person to sell or offer for sale, possess or use or attempt to use or give away, any toy or imitation pistol or revolver which substantially duplicates an actual pistol or revolver, unless said imitation or toy pistol or revolver shall be colored in colors other than black, blue, silver or aluminum, and further provided that the barrel of said toy or imitation pistol or revolver shall be closed with the same material of which the toy or imitation pistol or revolver is made for a distance of not less than one-half inch from the front end of said barrel. However, the possession or display of such instrument by a manufacturer or dealer, shall not be a violation of this section if sale is accompanied by delivery to a point without the city, and possession for such purpose by a manufacturer or dealer shall not be unlawful. Every such toy or imitation pistol or revolver hereinafter manufactured, distributed, transported or sold shall have legibly stamped thereon, the name of the manufacturer or some trade name, mark or brand by which the manufacturer can be readily identified.

However, possession or use of any toy or imitation pistol or revolver shall not be a violation of this section, where such possession or use is for or in the production of television programs or theatrical or motion picture presentations.

Any person who shall violate this subdivision shall be guilty of a misdemeanor, punishable by a fine of not more than one thousand dollars ($1,000) or imprisonment not exceeding one (1) year, or both.

(2)

Supreme Court, U.S.
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No. 96-196

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

JA-RU,

Petitioner,

- against -

CITY OF NEW YORK,

Respondent.

CITY RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

Respectfully submitted

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REPRODUCED ON RECYCLED PAPER

39 pp

COUNTER STATEMENT OF THE QUESTION PRESENTED

Did the New York Court of Appeals correctly rule that § 10-131(g) of the New York City Administrative Code, which, in substance, prohibits sale or possession of toy guns colored black, blue, silver or aluminum, was not preempted by the Federal Toy Gun Law, 15 U.S.C. § 5001, which, inter alia, requires (5001(b)(1)) that a blaze orange plug be placed in the barrel of a toy gun, and in 5001(g) preempts state or local laws or ordinances which "provide for markings or identification inconsistent with" the federal law?

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CITY RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

COUNTER STATEMENT OF THE CASE

Petitioner seeks review of a decision of the New York State Court of Appeals, 88 NY2d 163, dated May 7, 1996, which on an appeal by permission of the Appellate Division, First Department, answered a certified question in2 the affirmative and affirmed the Decision and Order of the Appellate Division, 213 AD2d 210, dated March 14, 1995, which, in turn, affirmed an Order of Supreme Court, New York County (Alice Schlesinger, J.), entered on or about April 12, 1994, which granted the plaintiff, the City of New York (the respondent herein), a preliminary injunction enjoining defendant (petitioner herein) from further violating § 10-131(g) of the Administrative Code of the City of New York (hereinafter, § 10-131).

As relevant here, § 10-131(g), which appears in full at 56a of Petitioner's Appendix, makes it "unlawful for any person to sell or offer for sale, possess or use or attempt to use or give away, any toy or imitation pistol or revolver which substantially duplicates an actual pistol or revolver, unless said imitation or toy pistol or revolver shall be colored in colors other than black, blue, silver or aluminum." Petitioner contended before the New York State Courts that § 10-131(g) was preempted by subsequent federal legislation, effective April 5, 1989, concerning the manufacture and sale of toy guns, 15 U.S.C. § 5001 (Federal Toy Gun Law) (Petitioner's Appendix 27a-29a), which provides, as mainly relevant here, that "It shall be unlawful for any person to manufacture, enter into commerce, ship, transport, or receive any toy, look-alike,

or imitation firearm unless such firearm" has . . . "as an integral part, permanently affixed, a blaze orange plug inserted in the barrel of such toy, look-alike, or imitation firearm. Such plug shall be recessed no more than 6 millimeters from the muzzle end of the barrel of such firearm." 15 U.S.C. § 001(c)(b)

15 U.S.C. 5001 has an express preemption clause, which states; "The provisions of this section shall supersede any provision of State or local laws or ordinances which provide for markings or identification inconsistent with provisions of this section", and expressly provides that no state shall prohibit the sale or manufacture of replicas of antique firearms developed prior to 1898 or prohibit the sale (other than to minors) of B-B, paint ball, or pellet-firing air guns.

As directed by the statute, the Department of Commerce promulgated regulations, 15 C.F.R.§ 1150.1-1150.5, which Petitioner provides to this Court in its Appendix (30a-57a), which generally repeat the statutory marking scheme with minor amplifications (§ 1150.3), and which contain a preemption provision, § 1150.5, repeating the statutory provision concerning inconsistent markings or identification (Petitioner's Appendix 55-56a).

Petitioner unsuccessfully urged before all three New York Courts that § 10-131(g) was preempted by the federal statute and regulations, arguing, in substance, that as long as a toy gun contained a blaze orange plug in the barrel no state or local law could prohibit its sale for noncompliance with any additional requirements. The New York State courts correctly rejected this extremely overbroad preemption claim.

Proceedings Before, and Decision of, Supreme Court, New York County

In the motion for a preliminary injunction and complaint the City contended that toy guns which substantially imitated an assault weapon, bearing the petitioner's name on the cardboard advertising back, were being offered for sale in New York City at a Job Lot store, in violation of § 10-131(g). The advertising stated that the object was a "KG-9 MACHINE SOUND PISTOL".... WITH GUNFIRE SOUND REPLICA OF THE KG-9 MACHINE PISTOL."

The City contended that the KG-9 substantially duplicated an actual Tec-9 semi-assault weapon. The toy pistol was entirely black in color, in violation of § 10-131(g) of the Administrative Code, except for one orange piece at the tip. A photograph of the toy pistol with a black tape over the orange colored area was provided to show how easily the orange trim could be completely covered, further enhancing the resemblance of the toy pistol to a real Tec-9 pistol. The imitation pistol also lacked any stamp bearing the name of the manufacturer, trade name or brand, and in that respect also violated § 10-131(g) of the NYC Admin. Code.

The City's submission included photographs of an imitation pistol and an imitation machine gun, a photograph of an actual Tec-9 semi-assault weapon, an operational description of a Uzi pistol and micro-Uzi, with a picture of a Uzi pistol; and the actual toy pistol and machine gun depicted in the photographs. The City also provided the affidavit of Dominic C. Buccigrossi, a New York City Police Sergeant with expertise in ballistics, who stated that

since 1991 the New York City Police Department had confiscated over 2000 toy and imitation guns which had been examined by the Department's Ballistics Squad, with a substantial number of these imitation guns recovered from minors. Sgt. Buccigrossi stated that toy guns were used in the commission of numerous serious crimes, including rape, assault and robbery, that he examined the toy KG-9 pistol at issue and that its design substantially duplicates that of the Tec-9 pistol, which is commonly used in commission of violent crimes, and that he examined a toy Uzi machine sound gun before the IAS Court (sold by another defendant, not petitioners), and in its design it substantially duplicates the Uzi pistol, which is commonly used to commit violent crimes.

By affirmation of its counsel, Frederick B. Locker, JA-RU contended that NYC Admin. Code § 10-131(g) was specifically preempted by 15 USC 5001. Mr. Locker alleged that under the Federal law, if a toy gun contained a permanently affixed blaze orange plug inserted in the barrel it could be marketed lawfully anywhere in the United States, and no State or local ordinance could prohibit its sale. The defendant JA-RU also submitted an answer to the complaint, verified by Mr. Locker as its attorney, which included the preemption claim as an affirmative defense. No affidavit was submitted by any officer or employee of JA-RU, and the record lacked any factual representation by JA-RU with respect to the KG-9 imitation gun purchased by the City attorney at the Job-Lot store.

OPINION OF THE IAS COURT

The Trial Court, State Supreme Court, New York County (IAS Court), rejected JA-RU's contention that

federal law preempted enforcement of NYC Admin. Code § 10-131(g) and that because the JA-RU KG-9 imitation gun had a blaze orange plug in the barrel, as required by 15 USC 5001(b)(1), it could lawfully be sold in New York City (20a-26a). The IAS Court cited to "the assumption 'that the historic police powers of the states are not to be superseded by Federal Act unless that is the clear and manifest purpose of Congress' Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)," and further stated that "in light of the strong presumption against preemption of state laws, the courts are obliged to narrowly construe the precise language of federal statutes to determine whether the State or local law is in fact preempted. Cipollone v. Liggett Group, Inc. 112 S.Ct. 2608 (1992)." (23a). According to the IAS Court, State laws were preempted "only when it was persuasively shown 'either that the nature of the regulated subject matter permits no other conclusion or that Congress has unmistakably so ordained,'" citing Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963) (23a).

The IAS Court pointed out that 15 USC 5001(g), which specifically refers to "preemption of state or local laws or ordinances: exceptions," had a limited preemptive scope, providing that the federal statute would supersede only those state or local laws "which provide for markings or identification inconsistent with provisions of this section," and also barring any state law prohibiting sale or manufacture of any look-alike, nonfiring, collector replica of an antique firearm developed prior to 1898 or prohibiting the sale (other than to minors) of traditional B-B, paint ball, or pellet-firing air guns that expel a projectile through the force of air pressure (24a). Furthermore, NYC Admin. Code § 10-131(g), which, like the federal law, sought to

prevent the marketing of toy guns which can be confused with real guns, was not inconsistent with the federal statute, since a manufacturer could comply with both laws (24a-25a).

The IAS Court also held that the issuance of a preliminary injunction was warranted. There was a likelihood that the City would prevail in its enforcement of NYC Admin. Code § 10-131(g) against JA-RU (25a-26a),because "in the absence of an injunction, additional people living and visiting this City will be victimized by individuals using these toy guns to facilitate their commission of violent crimes." (26a). The equities balanced in the plaintiff's favor because a "toy gun manufacturer has a right to seek out the lucrative marketplace of New York City but not at the expense and peril of the innocent people living here". (26a).

DECISION OF THE APPELLATE DIVISION

In a decision of the Appellate Division, First Department, reported at 213 AD2d 210, 623 NYS2d 851, the majority held that enforcement of § 10-131(g) was not preempted by 15 USC § 5001 and federal regulations , 15 CFR part 1150, because the historic police powers of the States were not to be superceded by a Federal Act unless that was the clear and manifest purpose of Congress, the laws were not in conflict and both the federal law and local law could be simultaneously satisfied, 213 AD2d at 210-211, 623 NYS2d 852-853, and the laws complemented each other.

The dissenters, citing to the preemption provision of the federal law, concluded that the Administrative Code

provision was inconsistent with the federal law because conduct which was lawful under the federal statute may be prohibited under local law. According to the dissenters, "[i]t is irrelevant that a manufacturer may be able to comply with the requirements of both Federal and local legislation" (213 AD2d at 213, 623 N.Y.S. 2d at 854) since the local prohibition of conduct permitted by federal law constituted a conflict between the laws and warranted the conclusion that the local law was expressly preempted by the federal law (213 AD2d at 213-214, 623 N.Y.S. 2d at 854).

By Order dated September 26, 1995, the Appellate Division, First Department, granted leave to appeal to the Court of Appeals upon a certified question pursuant to New York Civil Practice Law and Rules (CPLR) § 5713: "Was the order of the Supreme Court, as affirmed by this Court, properly made?" Under the CPLR, §§ 5601, 5602(b)(1), without such permission of the Appellate Division, this non-final order granting a preliminary injunction could not be appealed to Court of Appeals, and the Court of Appeals even lacked jurisdiction to permit the appeal.

DECISION OF THE COURT OF APPEALS

The Court of Appeals unanimously rejected petitioner's claim and affirmed the Decision and Order of the Appellate Division, First Department, City of New York v. Job Lot Pushcart and Ja-Ru, 88 NY2d 163, 643 N.Y.S.2d 944 (decided May 7, 1996). The Court recognized that the challenged law, § 10-131(g), involved the exercise of traditional police powers reserved to the states, and that:

> The United States Supreme Court has decreed that unless Congress manifestly and clearly intends to preempt the States' exercise of jurisdiction over matters relating to the welfare of their citizens, the States' police powers are not to be superseded by a Federal act (*see, Rice v. Santa Fe El. Corp.*,331 US 218, 230; *see also, Fidelity Fed. Sav. & Loan Assn. v. De La Cuesta*, 458 US 141, 152-53; *Auto Workers v. Wisconsin Bd.*, 351 US 266, 274-275 ["States are the natural guardians of the public against violence * * * We would not interpret an act of Congress to leave them powerless to avert * * * emergencies without compelling directions to that effect"]; *Florida Avocado Growers v. Paul*, 373 US 132, 146-47; NY Const, art IX, § 2[c] [ii]. Therefore, the "purpose of Congress is the ultimate touchstone" of preemption analysis (*Retail Clerks v. Schermerhorn,* 375 US 96, 103).
> (88 NY2d at 167, 643 N.Y.S.2d at 946)

The Court stated that the sweep of the Federal Toy Gun Law preemption clause was not as far reaching as petitioner contended, stating:

> Rather, the plain language employed by Congress demonstrates that only State regulation of replicas of antique collector firearms, B-B guns, paint ball guns, or pellet-firing air guns is expressly preempted under 15 USC § 5001(g), which bars any

> State from prohibiting the sale of such devices, and with respect to antique replicas of pre-1898 firearms, the manufacture of such devices (*see*, 15 USC § 5001 [g] [i], [ii]; *Coalition of N.J. Sportsmen v. Florio*, 744 F Supp 602, 608-609).
>
> The clearly defined reach of this provision compels the conclusion that Congress did not intend to supersede all local regulation of markings on toy guns. Where "Congress has considered the issue of preemption and has included * * * a provision explicitly addressing that issue * * * 'there is no need to infer congressional intent to preempt [other] state laws from the substantive provisions' of the legislation. * * * Congress' enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not preempted" (*Cipollone v. Liggett Group*, 505 US, at 517, (88 NY2d at 168, 643 N.Y.S.2d at 947).

The Court referred to the legislative history, particularly the comments of the Senate legislative sponsor, Senator Robert Dole, made during the Senate debate that the preemption section had been modified to accommodate a new California law, citing 134 Cong. Rec S.15531, S.15535 (October 11, 1988). These statements indicated that Congress did not intend to impliedly impose a pervasive preemptive federal regulatory scheme precluding any state regulation. Accordingly:

JA-RU's assertion, then, that the essential purpose of the Federal Toy Gun Law is to promote a "uniform system of national regulation": rings hollow. This contention is further undermined when JA-RU's true intention - the unimpeded flow of toy guns through interstate markets - is juxtaposed against the actual goal of the Federal Toy Gun Law - guarding the public safety, which was also the motivating objective for the City Council's adoption of Administrative Code § 10-131(g) in 1955 (*see*, 134 Cong Rec, at S 15534 [statement of Senator Dole that the purpose of his amendment was to "allow continued production, sale and distribution of (toy guns), while at the same time reducing the potential for misuse as much as possible" as "a few incidents have actually occurred to date involving the criminal misuse of toy or imitation guns"]; 134 Cong Rec H 10071 [Oct. 12, 1988] [statement of Representative Moorhead, same as above]; Proceedings of Council of NY City, at 24 [Jan. 18, 1955). However laudable a national public safety campaign regulating the sale and use of realistic toy guns may be, it remains that Congress did not enact the Federal Toy Gun Law to supplant all State and local measures. The issue then narrows to whether the conditions set forth in Administrative Code § 10-131(g) "provides for markings or identification inconsistent with provisions" (15 USC § 5001 [g]) of the

> Federal Toy Gun Law to the extent that there is "such actual conflict between the two schemes of regulation that both cannot stand in the same area" (*Florida Avocado Growers v Paul,* 373 US, at 141, *supra*). (88 NY2d at 169, 643 N.Y.S. 2d at 947, 948)

The Court then determined that there was no conflict between the Federal Toy Gun Law and § 10-131(g) warranting preemption of the latter by the former. It was not impossible to comply with both the local and federal law, citing Florida Avocado Growers v. Paul, supra, 373 U.S. at 142-143, nor did the local law stand as an obstacle to accomplishment of the full purposes and objectives of Congress, citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941); Barnett Bank v. Nelson, ___ US ___, 116 S.Ct. 1103 (1996). Id. 88 NY2d at 170, 643 N.Y.S.2d at 948. The Court concluded:

> The Federal Toy Gun Law only supersedes State or Local laws that "provide for markings or identification inconsistent with" its terms. The additional conditions imposed by Administrative Code § 10-131(g) do not conflict with the conditions enumerated in the Federal Toy Gun Law. As the Appellate Division noted "it is feasible to make a red or purple toy gun [which bears the manufacturer's trade name and contains] an orange [plug], thus satisfying both laws" (*City of New York v Job-Lot Pushcart*, 213 AD2d, at 210, *supra*). Therefore, it is not impossible to

> comply with both the Federal Toy Gun Law and Administrative Code § 10-131(g). *That* the sale of JA-RU's toy guns is only illegal under the terms of the local provisions is not a basis for preemption of the City law, as the dissenters below opine, because "this general principle applies only where the Legislature has shown its intent to preempt the field" (*Vatore v. Commissioner of Consumer Affairs of City of New York.*, 83 NY2d, at 651, *supra*). Indeed, compliance with both the Federal and local laws at once furthers the intent of Congress and achieves the public safety objective underlying each measure. ....States and localities can erect a regulatory framework that expands upon the Federal foundation, and to the extent that Administrative Code § 10-131(g) complements the Federal Toy Gun Law, the City's regulatory conditions can coexist with the Federal statute.
> (88 NY2d at 171, 643 N.Y.S.2d at 948)

FINALITY

Petitioner simply states that "[t]his Court has jurisdiction pursuant to 28 U.S.C. § 1257" (petition, p. 2), without any discussion of the fact that the Order on appeal involves the legality of a preliminary injunction, a non-final order, reviewed by the New York Court of Appeals only by permission of the Appellate Division, First Department on a certified question. Respondent does not urge this Court to dismiss the petition for certiorari as involving an order

which is not final within the meaning of 28 U.S.C. § 1257; but urges that the petition be denied because the ruling of the New York Court of Appeals is clearly correct and petitioner raises no substantial constitutional question. Nevertheless, the issue of this Court's jurisdiction under 28 U.S.C. § 1257 warrants brief discussion.

As a general rule, a ruling of the highest state Court determining whether a preliminary injunction should be issued is not a final judgment or decree within the meaning of 28 U.S.C. § 1257. Musser v. Sheppard, 299 U.S. 513 (1936). Where the New York State Court of Appeals determined a certified question by an Appellate Division in an appeal requiring permission of the Appellate Division because involving a non-final preliminary injunction order, this Court has held that the determination by the Court of Appeals of a federal constitutional question involved in the appeal does not render the determination by the Court of Appeals a final judgment or decree under 28 U.S.C. § 1257. Williams v. Quill, 303 U.S. 621 (1938) dismissing appeal of such an order of the Court of Appeals, 277 N.Y. 1 (1938); See also American Export Lines v. Alvez, 446 U.S. 274 (1980): Review by the United Supreme Court was sought of a ruling of the New York Court of Appeals on a certified question concerning amendment of a complaint in a maritime case brought in State Court. Resolution of this issue did not involve a final judgment or decree under 28 U.S.C. § 1257. However, by the time certiorari had been granted the State case had been tried and finally determined, and the federal question determined by the New York Court of Appeals was essential to the determination; therefore this Court determined the question.

An exception to the finality requirement of 28

U.S.C § 1257, which requirement limits review by this Court to final judgments and decrees, and therefore avoids piecemeal review of state court decisions, prevents advisory opinions where there may be no real "case" or controversy" in the sense of Article III of the Constitution, and minimizes federal intrusion in state affairs, exists when the challenged state court ruling finally determines a federal question which cannot be preserved for review in further state court proceedings and which is final in such state proceedings. North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973). In the instant situation, the determination of the certified question by the New York Court of Appeals cannot be further challenged in the state court proceedings. In addition, were the petitioner to prevail on other grounds besides its federal challenge to the local law, the preemption issue would evade review by this Court, a factor supporting this Court's review of the ruling of the New York Court of Appeals, See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 482, 483 (1975)[1]; Duquesne Light Co. v. Barasch, 488 U.S. 299, 306, 307 (1989).

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[1]Cox, however, involved a First Amendment restraint, a factor not present in this matter, See also Organization For a Better Austin v. Keefe, 402 U.S. 415, 418 (1971): preliminary injunction enjoining picketing was of sufficient duration to have a marked impact on petitioner's First Amendment rights, therefore it was reviewed by this Court; National Socialist Party of America v. Village of Skokie, 432 U.S. 43, 44 (1977): The highest state appellate court denied a stay pending appeal of an injunction restraining a march. The denial of a stay was reviewable because it would deprive petitioners of First Amendment rights during the period of state appellate review.

This Court has also reviewed rulings by the highest state appellate courts on federal preemption claims even though the rulings did not finally conclude the state proceedings. See Belknap Inc. v. Hale, 463 U.S. 491, 492-498 (1983); Local No. 438 Construction and General Laborers' Union AFL-CIO v. Curry, 371 U.S. 542 (1963). In those cases, however, the preemptive federal statute also provided for initial resolution of the issues by a Federal agency with special expertise, such as the National Labor Relations Board, see Belknap Inc. v. Hale, supra, 463 U.S. at 497; Local No. 438 v. Curry, supra, 371 U.S. at 550. In Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 178-180 (1988), State determination of the issues could have seriously eroded federal nuclear production policy, an area of traditional federal preeminence. The instant case, by contrast, involves no issue of adjudicatory supervision by a federal agency, with involvement of the Department of Commerce limited to the passage of regulations, and the conducting of a study in connection therewith. Petitioner even concedes the relevance here of the principle that "In performing the preemption analysis the Court starts with the assumption that the historic police powers of states are not to be superseded by federal acts unless that is the clear and manifest purpose of Congress." (Petition, p. 17).

Although, respondent does not seek dismissal of the writ, petitioner was not warranted in simply disregarding the close question of this Court's jurisdiction under 28 U.S.C. § 1257, which of course is always subject to independent examination and determination by this Court.

REASONS FOR DENYING THE WRIT

This Court recently stated in Medtronic, Inc. v.

Lohr, 116 S. Ct. 2240, 2250 (1996), that in construing the scope of an express preemption provision of a statute the interpretation is informed by two presumptions about the nature of preemption.

> First, because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action. In all pre-emption cases, and particularly in those in which Congress has "legislated...in a field which the States have traditionally occupied," *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91, L.Ed. 1447 (1947), we "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.*, at 230, 67 S.Ct at 1152; *Hillsborough City.*, 471 U.S., at 715-716, 105 S.St, at 2376; cf. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 22, 107 S.Ct. 2211, 2223, 96 L. Ed.2d. 1 (1987). Although dissenting Justices have argued that this assumption should apply only to the question whether Congress intended any pre-emption at all, as opposed to questions concerning the *scope* of its intended invalidation of state law, see *Cipollone*, 505, U.S. at 545-546, 112 S.Ct., at 2632-2633 (SCALIA, J,. concurring in judgment in part, and dissenting in part), we used a "presumption against the pre-emption of

state police power regulations" to support a narrow interpretation of such an express command in *Cipollone*. *Id.*, at 518, 523, 112 S.Ct, at 2618, 2621. That approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety.

Second, our analysis of the scope of the statute's pre-emption is guided by our oft-repeated comment, initially made in *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103, 84 S.Ct., 219, 222, 11 L.Ed.2d 179 (1963), that "[t]he purpose of Congress is the ultimate touchstone" in every pre-emption case. See, *e.g.*, *Cipollone*, 505 U.S. at 516, 112 S.Ct., at 2617; *Gade*, 505 U.S. at 96, 112 S.Ct., at 2381-2382; *Malone v. White Motor Corp.*, 435 U.S. 497, 504, 98 S.Ct. 1185, 1190, 55 L.Ed2d 443 (1978). As a result, any understanding of the scope of a pre-emption statute must rest primarily on "a fair understanding of *congressional purpose*." *Cipollone*, 505 U.S., at 530, n 27, 112, S.Ct., at 2624, n. 27 (opinion of STEVENS, J.). Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the "statutory framework" surrounding it. *Gade*, 505 U.S., at 111, 112 S.Ct., at 2390 (KENNEDY, J), concurring in part and concurring in judgment). Also relevant, however, is the "structure and purpose of the statute as a whole," *id.*, at 98, 112

> S.Ct., at 2383 (opinion of O'CONNOR, J.). as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.

The Court of Appeals correctly concluded that the preemption provision of 15 USC § 5001(g) did not preempt § 10-131(g). The limited preemptive intent and scope of 15 USC § 5001(g) is apparent from the express language thereof. Given the presumption against federal preemption of State police power regulations, a specific preemption provision in such a federal statute should be narrowly construed; and, absent explicit language in the preemption provision mandating preemption of state and local regulation, claims of express and implied preemption under the federal statute should be rejected. Cipollone, supra, 505 U.S. at 516-518.

The language of the express preemption provision of the federal statute, subd. (g) of 15 USC 5001, renders completely unenforceable state and local laws prohibiting sale or manufacture of nonfiring collector replica of antique firearms, developed prior to 1898 (subsection i), as well as the sale (other than to minors) of traditional B-B, paint ball or pellet-firing air guns (subsection ii), and preempts "State or local laws or ordinances which provide for markings or identification inconsistent with provisions of this section." The express language of this limited preemption provision defeats petitioner's claims. The preemption provision in the federal statute clearly and unambiguously expressed the complete preemption of state or local laws prohibiting the

sale or manufacture of antique firearms, and the sale (other than to minors) of B-B paint ball, and pellet-firing air guns, and did not otherwise provide for complete preemption of other regulation. "Obviously, Congress knew how to preempt in this very statute when it wanted to." Motor Vehicle Manufacturers Association v. Abrams, 899 F.2d 1315, 1319 (2d Cir. 1990) *cert. den.* 499 U.S. 912 (1991), where an express preemption provision, narrowly limited to preclude certain state regulatory requirements, indicated a lack of congressional intent to further preempt state enforcement.

The preemption provision of subdivision (g) is not a broad preemption provision of the type construed by the courts as precluding state regulation. See Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 138, 111 S. Ct. 478, 482 (1990); FMC Corp. v. Holliday, 498 U.S. 52, 57-58, 111 S. Ct. 403, 407 (1990); Shaw v. Delta Airlines Inc., 463 U.S. 85, 91 (1983): ERISA preemption provision, 29 U.S.C. § 1144(a), has a broad reach, superseding "any and all State laws as they may now or hereafter relate to any employee benefit plan"; Morales v. Trans World Airlines, 504 U.S. 374, 383-384, 112 S. Ct. 2031, 2036-2037 (1992): broad scope was afforded to the Federal Airline Deregulation Act which had a preemption provision barring states "from enacting or enforcing any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier"; Medtronic Inc. v. Lohr, supra, 116 S.Ct. 2240, interpreting 21 U.S.C. § 360 (k), preempting any requirement "(1) which is different from, or in addition to, any requirement applicable under this chapter to the device and (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the

device under this chapter"; Jones v. Rath Packing Co., supra, 430 U.S. at 530-531, interpreting 21 U.S.C. § 678, prohibiting the imposition of "marking labeling, packaging or ingredient requirements in addition to, or different than those made under," the Federal law; Mobil Oil Corp. v. Virginia Gasoline Marketers, 34 F.3d 220, 224 (3d Cir. 1994); *cert. den.* 115 S.Ct. 1097 (1995); interpreting 15 USC § 2806(a) preempting all State laws governing petroleum franchising unless the State law was "the same as" the corresponding federal act provisions; In Defense of Animals v. Cleveland Metroparks Zoo, 785 F.Supp. 100, 102 (N.D. Ohio 1991): involving the preemption provision of the Federal Endangered Species Act, 16 USCA § 1535(f), which explicitly provided for the broad preemptive reach petitioner attributes to the very differently worded subject preemption provision, providing with respect to interstate or foreign commerce in endangered species that "any state law or regulation .... is void to the extent that it may effectively (1) permit what is prohibited by this chapter or by any regulation which implements this chapter, or (2) prohibit what is authorized pursuant to an exemption or permit provided for in this chapter or in any regulation which implements this chapter."

The preemption provision at issue provides that the federal law supersedes "any provision of State or local laws or ordinances which provide for markings or identification inconsistent with provisions of this section." In a preemption statute, the term "inconsistent with" means there is "direct conflict between" the federal and state law "such that compliance with both is a physical impossibility." National Tank Truck Carriers v. City of New York, 677 F.2d 270, 275 (2d Cir. 1982): Federal regulations preempted any requirement of a state or political

subdivision thereof "which is inconsistent with" a federal law and regulations governing transportation of hazardous materials. Although New York City route requirements for such transportation might cause some delay in the transportation of the materials, the City regulations were not inconsistent with the federal law, having the same safety objectives as the federal law. Compliance with both the federal law and the City regulations was not a physical impossibility. Nor were the City regulations an obstacle to accomplishments of any federal statutory purpose. Atlantic Healthcare Benefits Trust v. Googins, 2 F.3d 1, 5, 6 (2d Cir. 1993) *cert. den.* 114 S. Ct 689 (1994): ERISA provided that with respect to a multiple employer welfare arrangement "any law of any State which regulates insurance may apply ... to the extent not inconsistent with" ERISA provisions, See 29 U.S.C. § 1144 (b) (6). Connecticut laws regulating such a plan were not inconsistent with ERISA because additional costs were imposed on the plan as a result of compliance with State law.

In Florida Lime and Avocado Growers v. Paul, 373 U.S. 132 (1963), a California law, enacted in 1925, prohibited the sale of avocados which did not contain 8% quantities of oil, while avocados grown in Florida qualified for interstate sale under a federal statute enacted in 1937 and a regulatory scheme, developed in 1954, which did not include that oil content requirement. Compliance with the minimum federal standard did not immunize the Florida product from compliance with the additional California standard, enacted to accomplish valid state consumer protection objectives, id. at 144, given the absence of an unambiguous congressional mandate to preclude such additional state regulation. Nor was there irreconcilable

conflict between the federal and state standards, since it was possible to comply with both (The Court gave as an example of an irreconcilable conflict of laws a federal law prohibiting marketing of an avocado with more than 7% oil content and a state regulation prohibiting marketing of an avocado with less than 8% oil content. id. at 143).

As the Court of Appeals, as well as the two lower courts pointed out, it is not impossible to comply with both the Federal Toy Gun Law and § 10-131(g). The Court of Appeals stated, 88 NY2d at 170, 643 NYS2d at 948, as did the Appellate Division, 210 AD2d at 211, "it is feasible to make a red or purple toy gun [which bears the manufacturer's trade name and contains] an orange [plug], thus satisfying both laws."

In New York State Department of Social Services v. Dublino, 413 U.S. 405 (1973), this Court upheld New York State work rules for public assistance recipients against a claim that the rules were preempted by federal statutory work incentive provisions. Although the state work rules were more extensive than, and different from, the federal requirements there was no indication of an express or implied Congressional intent to preclude the additional state regulation and program, which supplemented the federal program and regulations, providing only minimum standards and benefits.

In Hillsborough County v. Automated Medical Laboratories, 471 U.S. 707 (1985), federal regulations concerning plasma collection did not preempt county ordinances and regulations imposing requirements in addition to the federal standards. There was no basis to imply an intent to preclude such local regulation involving

the exercise of a historic state and local police power. Such preemption would not be implied simply because the federal regulations were comprehensive. Id. at 716-719. Both sets of regulations could be enforced without conflict, and both the federal and local laws could coexist without the local regulation constituting an obstacle to the accomplishment and execution of the objectives of the federal regulations.

Where, as here, the Federal and local laws share the same objective -- averting danger posed by toy guns which closely resemble real weapons -- the local regulation does not impede the objective of the federal law, which provided minimum standards which the state or localities could supplement. See Stern v. General Electric Co., 924 F.2d 472, 476 (2d Cir. 1991); Automobile Importers of America v. State of Minnesota, 871 F.2d 717 (8th Cir. 1989) *cert. den.* 493 U.S. 872 (1989); Motor Vehicle Manufacturers Assoc. v. Abrams, supra, 899 F.2d at 1322-1323: minimum federal regulatory requirements for enforcement of warranties did not preclude states from legislating additional requirements as long as compliance with both the federal and state requirements was possible. See also Medical Society v. Cuomo, 976 F.2d 812 (2d Cir. 1991); Pennsylvania Medical Society v. Marconis, 942 F.2d 842 (3rd Cir. 1991); New York State Society of Orthopedic Surgeons v. Gould, 796 F. Supp. 67, 73 (E.D.N.Y. 1992), each rejecting the contention that a federal medicare law which did not ban "balance billing" by participating physicians preempted State law prohibitions of the practice. "The mere fact that federal law permits an act does not necessarily mean that State proscription of it is incompatible with the federal enactment." Id. 796 F. Supp. at 73.

Petitioner's contention is simply that any state or

local regulation which imposes any requirement in addition to the federally mandated orange plug in the barrel of a toy gun is preempted. This construction of the term "inconsistent with" would preclude any state or local regulation which in any way differed from the federal requirements, a clearly overbroad, erroneous construction of the limited preemption provision, 15 U.S.C. 5001(g). In interpreting the term "inconsistent with" in the New York State constitutional Home Rule provision, Article IX, § 2(c), and the New York State Municipal Home Rule Law, § 10(1)(i)(ii), precluding local governments from exercising their police power by adopting laws that are "inconsistent with" the State Constitution or with any general law of the State (which provisions, unlike federal preemption provisions involving police powers, are not subject under New York law to a presumption of restrictive application), the New York Court of Appeals has rejected the contentions that preemption of local law is warranted simply because both state and local laws regulate the same subject matter, or a local law imposes requirements not included in the State legislation, as long as the State laws do not evince an intent to preempt the field. Jancyn Manufacturing Corp. v. Suffolk County, 71 NY2d 91, 97 (1987). Nor is preemption warranted simply because the local law prohibits what the State law permits. Such a "statement of the law is much too broad" because under such a rule all local power to regulate would be illusory. Id., 71 NY2d at 100, citing New York State Club Association v. City of New York, 69 NY2d 211, 221 (1987) affd 487 U.S. 1 (1988); People v. Cook, 34 NY2d 100, 109 (1974); Accord: Incorporated Village of Nyack v. Daytop Village Inc., 78 NY2d 500, 508 (1991). Congress could have easily precluded state and local regulation of toy guns, and clearly did not do so.

The Court of Appeals also correctly concluded that the legislative history of the provision compels the conclusion that Congress did not intend to supersede all local regulation. The Court noted the comments of Senator Dole, that the preemption section was modified to accommodate a new California law, and correctly reasoned that such a modification would not be made if Congress did not intend to permit any state or local regulation in addition to that under the federal law. 88 NY2d at 169, 643 N.Y.S.2d at 447.

The legislators also made other statements, indicating that the federal statute was not meant to preclude any additional state or local regulation. In statements in support of the federal legislation regulating imitation guns, both Senator Dole and Representative Dingell pointed out that the federal laws expressly superseded any state or local law which banned the sale of traditional B-B, paint ball or pellet-firing guns, and then gave an example quite similar to that provided by the IAS Court of the type of state or local law which would be preempted by the federal law in that it required markings inconsistent with federal law, which provides that the imitation gun have a blaze orange plug. "Also, if there were a state law that required a green colored plug or a red stripe on the side, that too would be nullified." 134 Cong Rec. S 29858, October 11, 1988, 134 Cong. Rec. H30081, October 12, 1988.

The primary objective of this legislation was safety. The Federal Toy Gun Law was primarily intended to reduce the hazard presented by toy guns, not to make uniform national standards primarily to facilitate the manufacture and sale of toy guns. The uniform national requirement of an orange plug in the barrel of a toy gun is a minimum

requirement which can be supplemented by state and local safety based regulations. The uniformly required orange plug has the safety purposes of ready visibility and the likelihood of more uniform recognition by the police and others knowledgeable as to the characteristics of toy guns, so that the toys will more readily be distinguished from real weapons. If each state or locality adopted a different marking system, and there was no minimal uniform federal requirement, law enforcement officers and others would not be able to remember all the possible markings denominating toy guns and to readily identify the toys.

The primary safety objective of the statute is evident from the comments of the legislators at the time of its passage. In support of the federal legislation, enacted in 1988, Senator Dole stated that the legislation sought to reduce the potential for "criminal misuse of toy or imitation guns" and the potential for tragedy when children have "some imitation firearms [which] are so realistic as to be absolutely indistinguishable from real firearms." 134 Cong. Rec. S 29857, October 11, 1988. Representative Sharp of Indiana said, in support of the legislation:

> The potential hazards and misuses of an object that resembles a deadly weapon ought to be evident to everyone. A person threatened with such an object can scarcely conduct a detailed examination to determine whether it is in fact real. Similarly, a police officer can hardly be expected to make a detailed inquiry concerning just how real the object in the hands of an adversary is before firing his gun. For these reasons, misuse of toy guns presents a real hazard and a

problem that needs to be addressed.

(134 Cong. Rec. H 30080, October 12, 1988)

Representative Levine of California stated in support of the legislation:

> My interest in the issue of toy guns is a result of some tragic toy gun-related incidents that have occurred in or near my district in Southern California during the past few years. Subsequently, there have been a flurry of toy gun incidents around the country, some of which have resulted in fatalities.
>
> These incidents can be attributed to the proliferation of toy weapons that are alarmingly realistic, and are the same shape and size as real guns. Toys that resemble the type of street weapons that gang members and drug dealers wield are being sold for the use of little children.

(134 Cong. Rec. H 30081, October 12, 1988)

Section 10-131(g) also has a primary safety objective. In sustaining the Administrative Code provision at issue against a claim of preemption by State law, the Court of Appeals, in People v. Judiz, 38 NY2d 529, 532 (1976), cited to the legislative history of the Administrative Code provision to establish its purpose "to prevent the sale, possession or use of models so closely copied from actual weapons as not to be readily discernible as toys." (1

Proceedings of Council of City of NY, p. 24 [1955].)

These two safety based statutes, the Federal Toy Gun Law and § 10-131(g), are not in conflict and can be harmoniously enforced. As the IAS Court stated (25a):

> If New York City precluded toy guns from having any plugs at all or required the plugs to be in a color other than bright orange, that would be inconsistent. In other words a manufacturer could not make his product simultaneously comply with both regulations.
>
> However, making a toy gun, red or purple, or yellow or green and putting a manufacturer's label on it could simultaneously be done by a manufacturer together with the insertion of an orange plug, that is if the manufacturer wanted his products sold in the New York City market. (See for example, in this regard the extended discussion of California's law regulating avocados found in Florida Lime and Avocado Growers, Inc. v. Paul, supra).

This observation was repeated by the appellate courts. As the Appellate Division stated, it is possible to make a toy gun which complies with both laws. "[A] toy gun with a closed barrel and an orange blaze band, made in a color other than those prohibited by the Administrative Code, would also satisfy both laws." 213 AD2d at 211, 623 NYS2d at 852; 564. The Court of Appeals decision makes the same point. 88 NY2d at 170, 643 N.Y.S.2d at

948.

The express language of the federal statute and regulations as well as the statements by the legislators concerning the statute establish that the federal law did not delineate the maximum permissible extent of regulation of toy guns, nor did it provide that there should be no further state or local legislative limitations on the marketing or possession of such objects. The intent to establish limitations on state regulation cannot "be created subtly" over an area involving exercise of the historic police powers of the state. It is assumed that such powers are not superseded by a federal act unless that was the clear and manifest purpose of Congress. Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495, 500 (1988), citing Hillsborough County v. Automated Medical Laboratories Inc., supra, 471 U.S. 707, 715, Jones v. Rath Packing Co., supra, 430 U.S. 519, 525; Rice v. Santa Fe Elevator Corp, supra, 331 U.S. 218, 230. The Court of Appeals correctly held that the Federal law and regulations did not supersede and nullify the Administrative Code provision § 10-131(g), regulating toy or imitation pistols and revolvers. Petitioner's position is entirely without merit, and the petition should be denied.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: August 28, 1996
New York, N.Y.

Respectfully submitted,

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